

No. 12482

United States
Court of Appeals
for the Ninth Circuit.

PACIFIC PORTLAND CEMENT COMPANY,
a corporation,

Appellant,

vs.

WILLIAM A. BELLAMY,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR 6 1950

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Northern District of California, Southern Division

No. 28909E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
and PACIFIC PORTLAND CEMENT
COMPANY, a corporation,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains and alleges that:

As and for a First cause of action:

I.

At all times herein mentioned defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant, at all times herein mentioned, was, and now is engaged in the business of a common carrier by railroad in interstate commerce at the Station of Redwood City, County of San Mateo, State of California.

II.

At all times herein mentioned, defendant Southern Pacific Company was a common carrier by railroad, engaged in interstate commerce, and plaintiff

was employed by defendant Southern Pacific Company in such interstate commerce, and the injuries sustained by him hereinafter complained of arose in the course of and while plaintiff and defendant Southern Pacific Company were engaged in the conduct of such interstate commerce.

III.

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51, et seq.

IV.

On or about April 4, 1949, at or about the hour of 5:35 P.M., plaintiff was regularly employed by defendant Southern Pacific Company as a brakeman of defendant Southern Pacific Company's local freight train Extra No. 2345 West at said Station of Redwood City, California.

At said Station of Redwood City the main-line track extends over the Bayshore Highway and in a sharp curve to the left toward and to the plant of the defendant Pacific Portland Cement Company. Said main-line track, on the outside curve thereof, is paralleled in close proximity thereto by a state highway known as the Redwood Harbor Road. Directly opposite said Harbor Road and across said main line, at an approximate distance of 75 feet from the intersection of said Bayshore Highway with said main line, is located a switch-stand of a spur track leading off of said main line

at said point and extending toward the right in a curved direction to the left.

At said time and place said freight train, consisting of 16 freight cars and a caboose, tender and locomotive, had arrived at said station and said yards, and was engaged in doing station switching over said main-line track and said spur track, and it became and was the duty of plaintiff to take a position upon said Harbor Road directly opposite from said switch-stand.

At said time and place defendant Southern Pacific Company carelessly and negligently failed to provide for plaintiff a safe place to work and did, on the contrary, carelessly and negligently maintain an unsafe and dangerous place for said plaintiff to work, among others, in the following respects: Said Harbor Road at said time and for a long period of time prior thereto was heavily used and traveled, and known by defendant Southern Pacific to be so used and traveled by motor vehicles, passenger automobiles, and freight trucks. In such switching movement a portion of said freight train was upon the main-line track curving to the left with the engine moving the same in a back-up position. The purpose of the movement was to pull from said spur track said cars of said train, and as the same cleared the spur track, it was plaintiff's duty to throw the switch. Neither the engineer nor the fireman of said engine crew had any, or adequate, view of said Harbor Road, nor of motor vehicles using and traveling the same, coming in the direc-

tion from said Pacific Portland Cement Company plant. Defendant Southern Pacific Company negligently failed to provide any person to warn or means of warning, or notice to the operators of motor vehicles so traveling said Harbor Road of the necessary presence upon said Harbor Road of members of the train crew of said freight train, and particularly of plaintiff engaged in such switching movement, and to protect the members of said train crew, including plaintiff, against being injured by motor vehicles so using said highway.

At said time and place defendant Southern Pacific Company, by and through the members of its train and engine crew of said freight train, other than plaintiff, carelessly and negligently made said switching movement, and carelessly and negligently operated said freight train in said switching movement.

At said time and place defendant Pacific Portland Cement Company was negligently operating toward and upon said highway and toward plaintiff, a motor vehicle, to wit: a light pick-up truck bearing California license BC-8992 and drove carelessly and negligently the same with great force and violence upon plaintiff.

Said negligence of defendant Southern Pacific Company aforesaid, and the negligence of said Pacific Portland Cement Company aforesaid occurred simultaneously and concurrently, and by reason thereof plaintiff sustained the personal injuries hereinafter enumerated.

V.

Plaintiff so received severe physical injuries and endured extreme physical pain and grievous mental anguish. Said physical injuries, so far as are now known, are particularly, although not exclusively, as follows, to wit: A compound fracture of the left arm, fractures of the bones of the left shoulder, numerous broken ribs on the left side, and severe internal injuries.

VI.

Since said accident and injury plaintiff, by reason thereof, has been under the care of various physicians, surgeons and nurses; he has incurred, and will continue to incur, liability for hospital and medical services necessary to the treatment and relief of said injuries in amount and amounts not determined or ascertainable at this time; plaintiff here prays leave that when said amount and amounts are ascertainable he may be permitted to amend this complaint to insert the same herein.

VII.

Prior to said injuries plaintiff was a well and able-bodied man of 52 years of age and was earning and receiving from his employment with defendant a regular salary of approximately \$350 per month. By reason of said injuries aforesaid plaintiff is now, and in the future will be, rendered incapable of performing his usual work or services, or any work or services whatsoever, all to the damage of plaintiff in the sum of \$75,000.

As and for a Second, Separate and Distinct cause of action:

I.

At all times herein mentioned plaintiff was, and now is, a citizen of the State of Georgia, and defendant Pacific Portland Cement Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of California.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

II.

Plaintiff realleges, excepting paragraph III thereof, paragraphs I to VII, inclusive, of the first cause of action as though fully set out herein.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of seventy-five thousand dollars (\$75,000), and for costs of suit herein incurred.

/s/ HERBERT O. HEPPELLE,
Attorney for Plaintiff.

Trial by jury of all of the issues in the above-entitled action is hereby demanded.

/s/ HERBERT O. HEPPELLE,
Attorney for Plaintiff.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT PACIFIC PORTLAND CEMENT COMPANY TO COMPLAINT

Defendant, Pacific Portland Cement Company, for its answer to the complaint in the above-entitled action, admits, denies and alleges as follows:

As to First Alleged Cause of Action

I.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs I, II, III, V and VI of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every allegation contained in said paragraphs I, II, III, V, and VI.

II.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph IV of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

“On or about April 4, 1949, at or about the hour of 5:35 P.M., plaintiff was regularly employed by defendant Southern Pacific Company as a brakeman of defendant Southern Pacific Company’s

local freight train Extra No. 2345 West at said Station of Redwood City, California.

“At said Station of Redwood City the main-line track extends over the Bayshore Highway and in a sharp curve to the left toward and to the plant of the defendant Pacific Portland Cement Company. Said main-line track, on the outside curve thereof, is paralleled in close proximity thereto by a state highway known as the Redwood Harbor Road. Directly opposite said Harbor Road and across said main line, at an approximate distance of 75 feet from the intersection of said Bayshore Highway with said main line, is located a switch-stand of a spur track leading off of said main-line at said point and extending toward the right in a curved direction to the left.

“At said time and place said freight train, consisting of 16 freight cars and a caboose, tender and locomotive, had arrived at said station and said yards, and was engaged in doing station switching over said main-line track and said spur track, and it became and was the duty of plaintiff to take a position upon said Harbor Road directly opposite from said switch-stand.

“At said time and place defendant Southern Pacific Company carelessly and negligently failed to provide for plaintiff a safe place to work and did, on the contrary, carelessly and negligently maintain an unsafe and dangerous place for said plaintiff to work, among others, in the following respects: Said Harbor Road at said time and for a long

period of time prior thereto was heavily used and traveled, and known by defendant Southern Pacific to be so used and traveled by motor vehicles, passenger automobiles, and freight trucks. In such switching movement a portion of said freight train was upon the main-line track curving to the left with the engine moving the same in a back-up position. The purpose of the movement was to pull from said spur track said cars of said train, and as the same cleared the spur track, it was plaintiff's duty to throw the switch. Neither the engineer nor the fireman of said engine crew had any, or adequate, view of said Harbor Road, nor of motor vehicles using and traveling the same, coming in the direction from said Pacific Portland Cement Company plant. Defendant Southern Pacific Company negligently failed to provide any person to warn or means of warning, or notice to the operators of motor vehicles so traveling said Harbor Road of the necessary presence upon said Harbor Road of members of the train crew of said freight train, and particularly of plaintiff engaged in such switching movement, and to protect the members of said train crew, including plaintiff, against being injured by motor vehicles so using said highway.

“At said time and place defendant Southern Pacific Company, by and through the members of its train and engine crew of said freight train, other than plaintiff, carelessly and negligently made said switching movement, and carelessly and negligently

operated said freight train in said switching movement.”

This defendant denies each and every part of the following allegations contained in paragraph IV of the first alleged cause of action of said complaint:

“At said time and place defendant Pacific Portland Cement Company was negligently operating toward and upon said highway and toward plaintiff, a motor vehicle, to wit: a light pick-up truck bearing California license BC-8992 and drove carelessly and negligently the same with great force and violence upon plaintiff.

“Said negligence of defendant Southern Pacific Company aforesaid, and the negligence of said Pacific Portland Cement Company aforesaid occurred simultaneously and concurrently, and by reason thereof plaintiff sustained the personal injuries hereinafter enumerated.”

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph VII of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

“Prior to said injuries plaintiff was a well and able-bodied man of 52 years of age and was earning and receiving from his employment with defendant a regular salary of approximately \$350 per month.”

This defendant denies each and every part of the following allegations contained in paragraph VII of the first alleged cause of action of said complaint:

“By reason of said injuries aforesaid plaintiff is now, and in the future will be, rendered incapable of performing his usual work or services, or any work or services whatsoever, all to the damage of plaintiff in the sum of \$75,000.”

In this connection, however, this defendant denies that plaintiff has been injured or damaged in any manner or amount whatsoever by reason of any carelessness, or negligence, or act, or omission of this defendant, or of any servant, agent or employee of this defendant.

IV.

As and for a Further and Separate Defense, this defendant alleges that plaintiff himself was careless and negligent in and about the matters alleged in the first alleged cause of action of said complaint, and that said carelessness and negligence on said plaintiff's own part proximately contributed to the happening of the accident and to the injuries, loss and damage complained of, if any there were.

As to Second Alleged Cause of Action

I.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph I of the second alleged cause of action of said

complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

“At all times herein mentioned plaintiff was, and now is, a citizen of the State of Georgia, . . .”

II.

For its answer to paragraph II of the second alleged cause of action of said complaint, this defendant hereby repeats and makes a part hereof all of its foregoing denials, allegations, admissions and separate defense contained in its foregoing answer to paragraphs I, II, IV, V, VI and VII of the first alleged cause of action of said complaint.

Wherefore, this defendant prays that plaintiff take nothing herein, and that this defendant have judgment for its costs of suit herein incurred.

/s/ LEIGHTON M. BLEDSOE,

/s/ DANA, BLEDSOE & SMITH,

Attorneys for Defendant Pacific Portland Cement Company.

Receipt of copy attached.

[Endorsed]: Filed July 21, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company, a corporation, a defendant above named, and answering

the complaint of plaintiff on file herein, and severally answering each alleged cause of action thereof, shows as follows:

I.

Admits the allegations of Paragraph I of the first alleged cause of action, and the same as incorporated in the second alleged cause of action, and further admits as follows:

On April 4, 1949, at about 5:35 p.m., plaintiff was employed by defendant Southern Pacific Company as a brakeman, working on defendant's freight train Extra No. 2345 West. Said train consisted of a locomotive engine and tender and seventeen cars, and was engaged in switching operations on the Paraffine Co. spur track at Redwood City, California. Said track was paralled to Harbor Road, a public street and highway in said city, and both said track and said road curved to the left. At said time and place plaintiff dropped off one of the cars of said train and stepped back onto said road. At said time a certain pickup truck owned by defendant Pacific Portland Cement Company, bearing California license COM. BC 8982, was being driven and operated on and along said Harbor Road. Said truck ran into and collided with plaintiff, and plaintiff was injured. At all times mentioned in the complaint and herein defendant Pacific Portland Cement Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of California.

II.

Defendant Southern Pacific Company has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegations of the complaint in respect of the nature and extent of plaintiff's injuries, or his age and citizenship. Defendant Southern Pacific Company denies each and every allegation of the complaint, and of each of the alleged causes of action thereof, not hereinabove admitted or denied.

And for a Second, Separate and Independent Answer and Defense to the Complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. At said time and place and on said occasion, plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said train and said road, and negligently performed his duties as a brakeman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to said accident, injuries and damages, if any, alleged by plaintiff.

And for a Third, Separate and Independent An-

swer and Defense to the Complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. At said time and place and on said occasion, plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said train and said road, and negligently performed his duties as a brakeman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause, and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

And for a Fourth, Separate and Independent Answer and Defense to the Complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. At said time and place and on said occasion defendant Pacific Portland Cement Company so negligently, carelessly, recklessly and unlawfully drove, operated, maintained and controlled said

truck as to cause the same to run into and collide with plaintiff. Said conduct of defendant Pacific Portland Cement Company, as aforesaid, was the sole cause, and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that defendant have judgment for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE & DUNNE,

Attorneys for Defendant Southern Pacific Company.

Affidavit of service by mail attached.

[Endorsed]: Filed August 16, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and against Defendant Pacific Portland Cement Co. and assess the damages against the Defendant in the sum of Fifteen Thousand (\$15,000.00) Dollars.

/s/ GENE D. McCLAIN,

Foreman.

[Endorsed]: Filed November 9, 1949.

In the Southern Division of the United States District Court for the Northern District of California.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
and PACIFIC PORTLAND CEMENT
COMPANY, a corporation,

Defendants.

JUDGMENT ON VERDICTS

This cause having come on regularly for trial on November 1, 1948, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Robert Hepperle, Esq. and Edward Digardi, Esq. appearing as attorneys for the plaintiff; Louis Phelps, Esq. appearing as attorney for the defendant Southern Pacific Company, and Leighton Bledso, Esq. appearing as attorney for the defendant Pacific Portland Cement Company, and the trial having been proceeded with on the 1st, 2nd, 3rd, 7th, 8th, and 9th days of November in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following

verdicts, which were ordered recorded, viz.: "We, the Jury, find in favor of the Plaintiff and against Defendant Pacific Portland Cement Co. and assess the damages against the Defendant in the sum of Fifteen Thousand (\$15,000.00) Dollars. Gene D. McClain, Foreman," and "We, the Jury, find in favor of the Defendant Southern Pacific Company. Gene D. McClain, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdicts and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant Pacific Portland Cement Company the sum of Fifteen Thousand and no/100 Dollars (\$15,000.00), together with his costs herein expended taxed at \$96.99, and that plaintiff take nothing by this action as to defendant Southern Pacific Company; that said defendant Southern Pacific Company go hereof without *day*, and that said defendant Southern Pacific Company do have and recover of and from plaintiff its costs herein expended taxed at \$33.60.

Dated: November 10, 1949.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket Nov. 10, 1949.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

SEPARATE REQUEST FOR INSTRUCTIONS
BY PACIFIC PORTLAND CEMENT COM-
PANY

Defendant's Instruction No. . .

It is the contention of defendant Pacific Portland Cement Company that the doctrine of leniency toward a workman in the street does not apply in this case.

(See: *Lewis v. Southern California Edison Co.*, 116 Cal. App. 44;

Milton vs. L. A. Motor Coach Co., 53 Cal. App. (2d) 566)

If the Court decides to give instructions to the jury which recognize the application of that rule defendant Pacific Portland Cement Company requests that the following instructions be given:

1. The rule of law which the Court has given to you concerning a workman in the street or roadway does not mean that such a person is not bound to use ordinary care for his own safety.

State Compensation Insurance Fund vs. Scamell, 73 Cal. App. 285 at 291.

2. If you find that the plaintiff in this case suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle, you are instructed that the rule of law governing workmen in the street or road has no application to such circumstances and your decision should be

governed by the general rules of law read to you by the Court concerning the duties and obligations of the ordinary pedestrian who is using a street or roadway.

Lewis v. Southern California Edison Co., 116 Cal. App. 44.

3. You are instructed that the rule of law that demands less vigilance of a workman in the street does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity.

Milton vs. L. A. Motor Coach Co., 53 Cal. App. (2d) 566.

4. If you find that the plaintiff was not forced to be or to remain in the place where he was injured on the roadway as a matter of duty, although he may have had a right to be there, and that his use of the roadway in the manner in which he used it at the time and place in question was a matter of choice and not a matter of necessity, then you are instructed that the plaintiff is not to be classed with laborers engaged in street work, and was, under such circumstances, required to exercise the ordinary care that is required of the ordinary pedestrian under such circumstances.

Milton vs. L. A. Motor Coach Co. 53 Cal. App. (2d) 566 at 573.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED INSTRUCTIONS

The plaintiff requests the Court to give all of the following instructions and hereby moves that the same be given on submission of the above-entitled cause to the jury herein.

/s/ HERBERT O. HEPPELLE,
Attorney for Plaintiff.

Plaintiff's Requested Instruction No. 7

Each Participant Liable

When the negligent acts or omissions of two or more persons whether committed independently or in the course of jointly directed conduct contributed concurrently and as proximate causes to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution.

Plaintiff's Requested Instruction No. 18

It is part of the duty of the operator of an automobile to keep his machine always under control so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others.

This rule of law applied to the defendant Pacific Portland Cement Company's driver in the operation of the automobile he was driving, and if you

• believe from the evidence that at the time and immediately before the collision in question he did not keep the automobile under control so as to avoid colliding with the plaintiff lawfully using said highway, then I instruct you that, in that event, he was negligent.

Plaintiff's Requested Instruction No. 19

You are instructed that at the time of the accident there was in effect Section 510 of the California Motor Vehicle Code, providing:

“No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.”

Under this statute it was one of the duties of the defendant Pacific Portland Cement Company's driver, in the exercise of reasonable care, to maintain a constant and vigilant lookout ahead for persons upon the highway and particularly those the performance of whose duties required them to be thereon.

If you find that the plaintiff, William A. Bellamy, was upon said highway in such position that defendant Pacific Portland Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, and that such failure proximately caused the accident and injury, then and in that event said driver was negligent, you will return your verdict in favor of plaintiff,

and in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight, for to look is to see and, in such circumstances, you must necessarily find that defendant's driver either failed to look, or having looked, did see the plaintiff in such position.

Plaintiff's Requested Instruction No. 24

While it is incumbent on plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT AND
OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named, and to Herbert O. Hepperle, His Attorney and to Defendant Southern Pacific Company, and to A. B. Dunne and Messrs. Dunne & Dunne, its attorneys:

You, and each of you, will please take notice that on Monday, the 28th day of November, 1949, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, or at any other time thereafter

fixed by the Court, the defendant Pacific Portland Cement Company, by its attorneys, will move the above entitled Court, the division thereof presided over by Honorable Herbert W. Erskine, at the courtroom of said court and division, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

(1) For an order under and pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, setting aside the verdict and judgment thereon heretofore entered in the above entitled action in favor of plaintiff and against defendant Pacific Portland Cement Company, and directing that said judgment be vacated and directing that judgment be entered in accordance with the motion of defendant Pacific Portland Cement Company for a directed verdict heretofore made. Attached hereto and marked Exhibit A and incorporated herein is the draft of the proposed order requested by this defendant.

(2) Said motion will be made upon this notice and upon all of the records, papers and files in the above entitled action, including the transcript of the testimony, all exhibits, and the proceedings had upon the trial of the above entitled cause, and upon the findings of the jury with reference to the defendant Southern Pacific Company.

(3) Said motion will be made on the ground that at the close of all the evidence the defendant Pacific Portland Cement Company made a motion

for a directed verdict, which should have been granted, but which was denied, and will be made upon all of the grounds heretofore stated as grounds for said motion for a directed verdict, and will be made upon the following grounds, and each of them:

(a) There was and is no evidence of any negligence on the part of defendant Pacific Portland Cement Company, or of any of its agents, servants or employees.

(b) There was and is no evidence of any negligence on the part of defendant Pacific Portland Cement Company or on the part of its agents, servants or employees, which was a proximate cause of any injury or damage to plaintiff.

(c) That it appears from the evidence introduced that the plaintiff was guilty of contributory negligence as a matter of law, and that said contributory negligence of the plaintiff proximately contributed to his injury and damage.

(d) That the evidence shows as a matter of law and without contradiction that the plaintiff failed to take the precautions required of an ordinarily prudent person under the circumstances existing at the time and place of the accident and negligently and carelessly failed to look in the direction from which danger was to be anticipated, and that said negligence and carelessness and failure to take the precautions of an ordinarily prudent person under the circumstances were, and each of them was, a proximate contributing cause to the injury and damage complained of by the plaintiff.

(e) That the Court has no jurisdiction of the

controversy as between plaintiff and defendant Pacific Portland Cement Company for the reason that a required diversity of citizenship did not at the time of the commencement of this action exist as between plaintiff and said defendant.

(f) That the plaintiff has failed as a matter of law to sustain his burden of proof with respect to diversity of citizenship as between him and defendant Pacific Portland Cement Company.

II.

(1) Defendant Pacific Portland Cement Company further and in the alternative will move the above entitled Court at the time and place hereinabove specified for an order under and pursuant to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting to defendant Pacific Portland Cement Company a new trial. Attached hereto and marked Exhibit B and incorporated herein is a draft of the proposed order for new trial.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial and the exhibits introduced in evidence, including the charge and instructions of the Court and the rulings of the Court on the instructions proposed by defendant Pacific Portland Cement Company, and upon the findings of the jury and its verdict with reference to the defendant Southern Pacific Company.

(3) Said motion will be made upon the following grounds, and each of them.

(a) That the plaintiff has failed to establish the required diversity of citizenship as between him and defendant Pacific Portland Cement Company.

(b) That the evidence shows that plaintiff at the time of the commencement of this action was a resident and citizen of the State of California, and the pleadings admit that the defendant Pacific Portland Cement Company was a resident and citizen of the State of California, and that there is no diversity of citizenship between said parties and no jurisdiction of said Court to hear the cause as between them.

(c) That the verdict is against the law.

(d) That the verdict is against the weight of evidence.

(e) That the verdict is contrary to the evidence.

(f) That the evidence is insufficient to sustain the verdict.

(g) Errors of law occurring at the trial and duly objected and excepted to and particularly in the giving of instructions requested by plaintiff and in the giving of general instructions by the Court, which were objected and excepted to and in the denial of defendant Pacific Portland Cement Company's proposed instructions to which denial said defendant duly objected and excepted, and rulings upon the admission of evidence.

(h) That the verdict of the jury in favor of defendant Southern Pacific Company establishes as

a finding of fact by the jury that the plaintiff was not required to be in the highway at the time and place he was when the accident occurred, and that none of the duties of plaintiff as a brakeman for Southern Pacific Company called for or required his being in the highway where he was at the time and place of the accident, and that by said verdict in favor of the Southern Pacific Company the issue of whether or not the plaintiff was entitled to the benefit and protection of the "workmen in the street" rule of law has been determined in favor of defendant Pacific Portland Cement Company, and plaintiff was contributorily negligent as a matter of law, and that the evidence establishes as a matter of law that plaintiff was negligent at the time and place of the accident, and that his negligence proximately contributed to the injury and damage complained of by him.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement
Company.

Exhibit A

In the District Court of the United States for the
Northern District of California, Southern Di-
vision.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and PACIFIC PORTLAND CEMENT
COMPANY, a Corporation,

Defendants.

ORDER

Defendant Pacific Portland Cement Company, a corporation, having duly moved the above-entitled Court to vacate and set aside the judgment herein heretofore rendered in favor of plaintiff and against said defendant and having moved the Court to render and enter judgment in accordance with its motion for a directed verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said motion, and the Court being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby vacated and set aside, and judgment against the plaintiff and in favor of defendant Pacific Portland

Cement Company, a corporation, be entered in accordance with defendant's motion for directed verdict heretofore made, and it is further

Ordered, Adjudged and Decreed that plaintiff take nothing herein and that defendant Pacific Portland Cement Company, a corporation, do have and recover its costs of suit herein.

Done in Open Court this day of, 1949.

.,
Judge of the United States
District Court.

Exhibit B

In the District Court of the United States for the Northern District of California, Southern Division.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and PACIFIC PORTLAND CEMENT COMPANY, a Corporation,

Defendants.

ORDER

Defendant Pacific Portland Cement Company, a corporation, having duly moved the above-entitled

Court to vacate and set aside the verdict and judgment herein and grant to said defendant Pacific Portland Cement Company, a corporation, a new trial, and the matter having been heard and submitted to the Court, and all of the parties having appeared upon the making and hearing of said motion, and the court having considered the same and being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein in favor of plaintiff and against defendant Pacific Portland Cement Company, a corporation, be and they are hereby vacated and set aside, and a new trial of this action is hereby granted to defendant Pacific Portland Cement Company.

Done in Open Court this day of, 1949.

.....,

Judge of the United States
District Court.

Receipt of Copy acknowledged.

[Endorsed]: Filed Nov. 18, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Wednesday, the 30th day of November, in the
year of our Lord, one thousand nine hundred and
forty-nine.

Present: The Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

ORDER DENYING DEFENDANT'S MOTIONS
FOR JUDGMENT NOTWITHSTANDING
THE VERDICT, OR FOR A NEW TRIAL

Defendant Pacific Portland Cement Company's
motions for judgment notwithstanding the verdict,
or for a new trial, heretofore having been argued
and submitted to the Court for consideration and
decision, now, due consideration having been had, it
is Ordered that said motions be severally denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice is hereby given that defendant Pacific Portland Cement Company (a corporation) hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered of record in the office of the clerk of the above-entitled court on the 10th day of November, 1949, in favor of the plaintiff and against said defendant.

Said appeal is taken from the whole and each and every part of said judgment.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement
Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS, AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL

Notice is hereby given that the defendant and appellant Pacific Portland Cement Company (a corporation) does hereby designate the following portion of the record, proceedings and evidence to be contained in the record on appeal in this cause:

1. Complaint.
2. Answer of defendant Pacific Portland Cement Company to Complaint.
3. Answer of defendant Southern Pacific Company to Complaint.
4. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.
5. The verdict of the Jury and Judgment entered thereon.
6. Motion of Defendant Pacific Portland Cement Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

7. Minute order denying motion of defendant Pacific Portland Cement Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

8. Instructions given by the Court.

9. Instructions proposed by defendant Pacific Portland Cement Company (a corporation) and refused by the Court.

10. Reporter's Transcript.

11. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

12. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

13. All other records required by the provisions of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement
Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California.

Before: Hon. Herbert W. Erskine,
Judge.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and PACIFIC PORTLAND CEMENT
COMPANY, a Corporation,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, November 1, 1949

Appearances, for the Plaintiff:

HERBERT O. HEPPELLE, JR., ESQ., and
EDWARD M. DIGARDI, ESQ.

For Defendant Southern Pacific:

LOUIS L. PHELPS, ESQ.

For Defendant Pacific Portland Cement Company:

LEIGHTON BLEDSOE, ESQ.

(A jury was duly impanelled and sworn, and following opening statements by counsel for the respective parties, the following occurred:)

WILLIAM A. BELLAMY

called as a witness in his own behalf; sworn.

The Clerk: Will you state your name to the Court and jury?

A. William A. Bellamy.

Direct Examination

By Mr. Digardi:

Q. How old are you, Mr. Bellamy?

A. 52 years old.

Q. And where do you live?

A. I have a room at 179 Jessie Street, San Francisco.

Q. Where is your home, Mr. Bellamy?

A. My home is in Carnesville, Georgia.

Q. Where were you born, Mr. Bellamy?

A. Carnesville, Georgia.

Q. When did you first come to California?

A. I came to California in the year of 1942.

Q. What was the occasion for your coming to California?

A. I came out here in the army.

Q. And——

Mr. Bledsoe: Objected to as incompetent, irrelevant and immaterial.

The Court: This is only preliminary.

Mr. Digardi: If Your Honor please, this is merely to show domicile.

The Court: I will allow it. [2*]

Q. (By Mr. Digardi): Will you answer the question, please?

* Page numbering appearing at top of page of original certified Transcript of Record.

(Testimony of William A. Bellamy.)

A. I came out here in the army.

Q. How long were you in the army, Mr. Bellamy?
A. Well, about—

Mr. Bledsoe: Same objection: incompetent, irrelevant and immaterial.

The Court: Same ruling.

Mr. Digardi: Answer the question, please.

A. Something over seven months.

Q. Were you discharged from the army?

A. Yes, sir.

Q. What was the reason for your discharge from the army?
A. Over age.

Mr. Phelps: Objected to as incompetent—Go ahead.

Mr. Digardi: Mr. Clerk, will you mark this?

(Thereupon photostat of document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Digardi): Mr. Bellamy, while counsel is examining the document, I can proceed with some other questions. Mr. Bellamy, have you always lived all of your life in Carnesville, Georgia?

A. Yes, sir, except a short while at the time—I have been out of there.

Q. Have you always maintained your permanent home in Carnesville, Georgia? [3]

A. Yes, sir.

Q. Now, you stated that you were discharged from the army because of over-age. Did the army

(Testimony of William A. Bellamy.)

have any provision or regulation concerning your discharge? Was there any prerequisite to your being discharged from the army?

A. In order to be released from the army, you had to have shown that you had employment in some industry there, that they had——

Q. Did you make such a showing to the army?

A. Yes, sir.

Q. And by whom were you employed?

A. Southern Pacific.

Q. And when did you first start your employment with the Southern Pacific Company?

A. The 11th of September, 1943.

Q. When you first took employment with the Southern Pacific Company, at that time did you intend to establish permanent residence in California?

A. No, sir.

Q. What was your intention?

A. Intention was going back to Georgia.

Q. Now, when the war ended, did you continue to work for the Southern Pacific Company?

A. Yes, sir.

Q. And did you work for the Southern Pacific Company up until [4] the time of the accident here?

A. Yes, sir.

Q. Had your intention ever been to establish a permanent residence in California?

A. No, sir.

Q. Have you ever voted in California?

A. No.

(Testimony of William A. Bellamy.)

Q. Mr. Bellamy, have you maintained in Carnesville, Georgia, connections with any organizations, lodges or the like? A. Yes, sir.

Q. Will you state what lodge that is?

Mr. Bledsoe: We will object to it as incompetent, irrelevant and immaterial. I don't see the——

Mr. Digardi: In order to show permanent—this is merely on the point of his domicile, Your Honor.

Mr. Bledsoe: The identity of the lodge, if the Court please, certainly shouldn't have any bearing on that.

The Court: Is there a question here about the diversity of citizenship?

Mr. Digardi: There is, Your Honor; defendant Pacific Portland Cement denied this.

The Court: The man's domicile?

Mr. Digardi: Yes, Your Honor.

The Court: I will allow the question.

Q. (By Mr. Digardi): Mr. Bellamy, do you have with you a card [5] showing your connection with any lodge organization in Georgia?

A. Yes, sir (producing).

(Document examined by Mr. Bledsoe.)

Mr. Bledsoe: I don't feel that the identity of the lodge, if the Court please, makes any difference. If he belongs to a lodge, that is the end of it.

Mr. Phelps: I don't see the materiality of it.

Mr. Digardi: Well, there is none, as to the Southern Pacific Company.

(Testimony of William A. Bellamy.)

The Court: Let me see that.

Mr. Digardi: It merely shows a paid-up membership through 1950, Your Honor. Your Honor, we might stipulate—

The Court: Oh, I don't think that the identity of the particular lodge is important, but it is a national order, isn't it?

Mr. Digardi: Yes, it is.

The Court: I think the fact that the date up to which his dues are paid is relevant, so I will admit the contents of this card so far as they show that. I can make the statement myself, that he paid, apparently, his dues up to October 31, 1950 in a lodge of a national order, fraternity, in Toccoa, Georgia.

Mr. Digardi: Thank you, Your Honor. I think that will be satisfactory. Could we withdraw this, then, so he won't lose it? [6]

The Court: Yes.

Q. (By Mr. Digardi): Mr. Bellamy, when you were discharged from the army, were you returned pursuant to the provisions of the Selective Service Act to the jurisdiction of a particular Selective Service board?

Mr. Phelps: Objected to as calling for the conclusion of the witness; he is asking for jurisdiction and asking him to interpret laws and everything else.

The Court: Well, I think that is too broad.

(Testimony of William A. Bellamy.)

Q. (By Mr. Digardi): Well, do you have with you a draft card, Mr. Bellamy?

A. Yes (producing).

Mr. Digardi: Will you mark this for identification, Mr. Clerk?

(Thereupon Selective Service registration card referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Digardi): Mr. Bellamy, when did you first join with the fraternal organization that was mentioned in the card that you had?

A. I don't remember the exact date. It has been twelve or more years ago.

Q. Have you maintained a membership in that organization continuously until the present time?

A. Yes, sir.

Mr. Digardi: If Your Honor please, we offer in evidence [7] Plaintiff's discharge from the army— We offer to show that he was inducted into the army and was discharged in California and discharged—

Mr. Bledsoe: Well, if that is all it is offered for, I will stipulate that that is what it proves.

Mr. Digardi: And that he was discharged for the convenience of the government, stated reason being over age 38; that is the only purpose.

The Court: Will you stipulate to that, too?

Mr. Bledsoe: Yes, Your Honor.

The Court: Well, those facts are now stipulated to, so there is no need for this.

(Testimony of William A. Bellamy.)

Mr. Digardi: We will accept the stipulation, Your Honor.

The Court: It is 12:00 o'clock so we will now take the recess until 2:00 o'clock.

Mr. Digardi: Thank you, Your Honor.

The Court: Ladies and gentlemen, before we recess will you bear in mind the admonition that the Court has heretofore given you. We will now recess this case until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [8]

Monday, November 1, 1949, 2:00 o'clock

WILLIAM A. BELLAMY

resumed the stand in his own behalf.

Direct Examination

(Continued)

By Mr. Digardi:

We offer in evidence, Your Honor, Plaintiff's Exhibit No. 5 for identification which is a Selective Service card of Mr. Bellamy. The Selective Service card indicates on one side local board No. 1, Franklin County, Georgia, November 11, 1944. On the reverse side notice of classification, William Adolphus Bellamy, order No. 10270, has been classified in Class 1-C (discharged) by local board. Then there is an X in the square marked "Local Board" dated November 11, 1944, M. A. Davis, member of local board.

(Testimony of William A. Bellamy.)

(Thereupon Plaintiff's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Digardi): Mr. Bellamy, at the time of this accident, by whom were you employed?

A. Southern Pacific Railroad.

Q. In what capacity? A. Brakeman.

Q. Mr. Bellamy, will you briefly tell us what type of work you did as a brakeman?

A. Freight work, picking up, setting out cars, switching cars in the yard. [9]

Q. Did you work on through freights?

A. Some, some local freights.

Q. And some local freights?

A. Mixed freight, yes.

Q. Mr. Bellamy, do you know of your own knowledge where those freight cars came from and where they went, the cars that you switched and handled in your train?

Mr. Phelps: Counsel, if your purpose is to establish interstate commerce, I will stipulate that he was engaged in interstate commerce at the time of the accident and received his injury at that time in the course and scope of his employment.

Mr. Digardi: Thank you, that was our purpose.

Q. Now, Mr. Bellamy, prior to this accident, what was the state of your health?

A. Good.

Q. Had you passed physical examination prior to your entry into the army? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Was your service limited or general service in the army? A. General service.

Q. Now, getting to the date of the accident, do you recall what date that was?

A. The day of the accident?

Q. Yes. [10] A. April 4th.

Q. Of 1949? A. 1949, yes, sir.

Q. What time did you go to work that day?

A. The job was supposed to leave at 4:00 o'clock. I believe it was called, I believe I was called on duty at 3:30. I believe that is when I went to work.

Q. And where did you go to work?

A. Bayshore yards.

Q. Bayshore yards? A. Yes, sir.

Q. Here in San Francisco?

A. San Francisco.

Q. And where was the destination of your train?

A. Redwood City.

Q. And did it have a particular number, that train, or a job number?

A. This was an extra job just put on. It had a number, but, really, I don't know.

Q. Was it a local freight?

A. Local freight, yes, sir.

Q. And you went to work at 3:30, approximately? A. Yes, sir.

Q. Where did the train proceed from Bayshore?

A. To Redwood City. [11]

Q. Do you recall how many cars there were in the train, just roughly?

(Testimony of William A. Bellamy.)

A. No, sir, I do not.

Q. When you arrived in Redwood City, what did you do?

A. We had some work to do there in Redwood City yards, so we switched out our train there in the Redwood City yards.

Q. When you say you had work to do, what did that work consist of?

A. It consisted of switching out some cars and picking up some cars to go to the cement plant.

Q. In other words, you were taking cars out of your train and leaving them there and picking up other cars from the yard in Redwood City and putting them into your train, is that correct?

A. Mostly picking up cars at Redwood City yard and taking them to the harbor.

Q. I see. When—Then after you left Redwood City, where did you go then?

A. We had headed for what they call the harbor.

Q. That is, Redwood City harbor?

A. Yes, sir.

Q. Who were the other members of the train crew?

A. George Lechner was the conductor and Paul Husson and Joe Quinlan, two brakemen.

Q. And you were yourself a brakeman?

A. Brakeman, yes, sir. [12]

Q. Do you know who the engine crew were?

A. I understand Frank Edwards was the engineer; and so far as the fireman, I couldn't say.

(Testimony of William A. Bellamy.)

Q. You then proceeded toward Redwood City harbor? A. Yes, sir.

Q. In what direction is that from Redwood City? A. That would be east, I guess.

Q. Now, Mr. Bellamy, when you arrived at the Bayshore Highway, was there any cut made in your train at that time?

A. On our way to the harbor?

Q. On your way to the harbor.

A. Yes, sir.

Q. And will you describe what you did at that point?

A. We stopped back of the Bayshore Highway and left our main train and a cut and went to the asbestos plant.

Mr. Digardi: Now, Mr. Clerk, I think we might mark these two maps as the next two exhibits. We probably need them marked separately, so we can refer to them.

The Clerk: The first map you used this morning is marked Plaintiff's Exhibit No. 6 for identification—Are you offering them in evidence?

Mr. Digardi: We might as well have them in evidence.

The Court: Any objection?

Mr. Bledsoe: No objection, Your Honor.

Mr. Phelps: No objection. [13]

The Court: They may be admitted in evidence.

The Clerk: The second chart you have on the

(Testimony of William A. Bellamy.)

board now is marked Plaintiff's Exhibit 7 in evidence.

(Thereupon the two charts on blackboard of purported location of accident were received in evidence and marked Plaintiff's Exhibits 6 and 7 in evidence.)

Q. (By Mr. Digardi): Calling your attention to Plaintiff's Exhibit No. 6, Mr. Bellamy, I assume the directions are roughly the same as on this—north is at the top of the map, roughly, south on the bottom, west to my lefthand side facing the map and east to the right. Now, would you indicate where Bayshore Highway is on this? It is not shown, but where would Bayshore Highway be?

A. It would be to the left of it.

Q. So Bayshore Highway would be out in this direction, is that correct? A. Yes, sir.

Q. To the west of this map? A. Yes, sir.

Q. And it is indicated, this is the line of the railroad running through here—Has this got any particular name? Is this the main line or what, Mr. Bellamy?

A. Well, you call that the main line to the harbor.

Q. Shall we mark on here "main line to harbor"?

And now, Mr. Bellamy, there is indicated a switch and a spur [14] track leading off of the main line. What is that switch, what is that spur track?

(Testimony of William A. Bellamy.)

A. That spur track goes into a little asbestos plant.

Q. Is that what is known as the paraffine spur?

A. Down in the Paraffine spur.

Q. Now, as you were coming in with your train, you stated you left the main body of the train on the west side of Bayshore Highway. Now where did your train, the remaining part of the train, proceed then?

A. The engine and the cars, we had to proceed toward the asbestos plant, the paraffine spur.

Q. Now, do you recall what cars there were and in their order as they came into the asbestos spur, starting from the east end of the train and going to the west?

A. In going in, we had one car ahead of the engine and a couple of cars to the rear of the engine.

Q. So then on this track as you came in, there was a car ahead of the engine, the engine, tender and two or three cars to the rear of the engine, is that correct?

A. Yes, sir.

Q. Now, as you proceeded into the paraffine spur, what did you do? Not you personally, but what was the movement that was made there?

A. In going in there, we was to go in and pick up some cars that was supposed to come out and leave this one car we had [15] ahead of the engine.

Q. And in doing that, what was the maneuver to be made by the train? You first stated you went

(Testimony of William A. Bellamy.)

in and you picked up these two cars. Now, what do you mean by "picked up"?

A. We caught ahold of them and pulled them out.

Q. In other words, you coupled onto the two cars that were in with the cars that were already ahead of the engine, is that correct?

A. Yes, that's right.

Q. And then after you had coupled onto the cars, what was the movement to be made?

A. We was to pull out of the spur and shove the ones we just picked up on the main line and go back in and spot up the ones supposed to be left in there.

Q. Now, see if I am correct. You were coming in in this direction, from the west toward the east, with a train which consisted of one car ahead of the engine, the engine and two cars to the rear of the engine; and you were to come up the main line and into the paraffine spur. There you coupled onto two cars, on the head of the engine and were proceeding to back out. Your purpose being, when you cleared the switch, to shove down the main line, disconnected those cars, back up and go in and leave the one car that was ahead of the engine in the paraffine spur, is that correct?

A. The one car, one of the cars that we just brought out was [16] supposed to go back. That was my understanding.

(Testimony of William A. Bellamy.)

Q. Now, Mr. Bellamy, at what point—did you complete the maneuver?

A. No, sir, it hadn't been completed yet.

Q. On what movement of the train was it that you were injured? Which way was the train moving?

A. It was moving toward Redwood City. That would be to the west on your map.

Q. Were you coming out of the spur?

A. Coming out of the spur.

Q. Now, where were you riding on that movement?

A. I was riding the car ahead of the engine.

Q. That is, the car to the east of the engine?

A. Yes, sir.

Q. What position had you taken on that car?

A. I had just caught the first step of the ladder and just hanging on the side of the car.

Q. And the car was backing, and the train was backing toward the west? A. Yes, sir.

Q. Now, what was your particular duty? You were which brakeman on the job?

A. I was what we call the head brakeman.

Q. And were you also what is known as the "pin puller"? A. Yes, sir. [17]

Q. Now, what was your particular job to do in respect of this maneuver?

A. My job was to work between the engineer and the crew, work between them.

Q. Now, when the car backed out, the train

(Testimony of William A. Bellamy.)

backed out onto the main line, what were your duties at that time?

A. My duties, to look for signals and after the cut of cars passed over the switch, to line the switch for the movement.

Q. In other words, when the train cleared this switch, you were to reline it for the main line, is that correct? A. Yes, sir.

Q. Now, Mr. Bellamy, did you drop off of that cut or leave the car and go onto the ground?

A. Yes, sir.

Q. Could you indicate on this map, Plaintiff's Exhibit No. 6, approximately where you dropped off the train? A. Approximately, yes.

Q. Will you step down and do so? I have a pencil here. You can indicate.

A. Just the intersection there, so along in here somewhere I dropped off, down in between here and here (indicating).

Q. Would this be approximately the indication? We will mark this spot with an X and mark it B-1.

A. Somewhere around there.

Mr. Phelps: May the record show that the witness is again [18] noticing to his counsel a little bit more to the right, as well as at the point where his counsel placed the X on the map, which would be a little bit more east.

Q. (By Mr. Digardi): Does that spot approximately indicate where you dropped off the train?

A. Approximately.

(Testimony of William A. Bellamy.)

Q. Thank you. You may resume the witness stand. Now, Mr. Bellamy, after you dropped off the train—well, first, before you dropped off the train, did you look in any direction?

A. Yes, sir.

Q. Which directions did you look?

A. I looked facing the crew—I was facing the crew, and coming out and I was looking toward the east.

Q. You were looking toward the east and then what happened?

A. Left the car and stepped over in the highway and was moving toward the switch.

Q. In what direction were you facing while you were moving toward the switch?

A. I was facing the engineer and facing the engine.

Q. In other words, your back was to the west?

Mr. Phelps: To the east.

Q. (By Mr. Digardi): Your back was to the east?

A. After I left the cars.

Q. And were you on the highway or otherwise?

A. I was on the highway. [19]

Q. About how far from the edge of the railroad tracks were you into the highway?

Mr. Phelps: At what time, now?

Mr. Digardi: - Immediately after he dropped off, he stated he crossed over the tracks onto the highway.

Mr. Phelps: Well, do you mean when he first got

(Testimony of William A. Bellamy.)

onto the highway how close was he to the edge?

Mr. Digardi: Would you repeat the original question, Mr. Reporter?

(Question read.)

Mr. Phelps: I say the question is unintelligible. What time?

Mr. Digardi: I will withdraw the question.

The Court: Yes, reframe it.

Q. (By Mr. Digardi): Mr. Bellamy, will you describe in your own words what happened after you left, dropped off the car?

A. I dropped off the car and was facing the engineer, I went over into the highway, I had been there only a short while when I was struck down by the car, whatever hit me.

Q. Do you know how far you were into the highway at the time you were struck?

A. I couldn't say for exact.

Q. Could you give your best estimate as to how far away you were from the side of the train at the time you were struck?

A. Approximately six, seven feet—six, seven, eight feet, six [20] feet.

Q. Six feet is your best estimate?

Mr. Phelps: Well, I will submit that is leading. The witness has said six, seven or eight. The objection is made on that ground.

Q. (By Mr. Digardi): Now, Mr. Bellamy, did you have any warning that you were about to be

(Testimony of William A. Bellamy.)

struck before you were struck? A. No, sir.

Q. Do you know of your own knowledge what hit you? A. No, sir.

Q. Will you tell us where you were struck, what part of your body was struck?

A. Well, I was struck from the rear on the shoulder and side.

Q. On the left side, indicating?

A. Yes, sir.

Q. And what happened then?

A. I was struck down and afterwards took to the hospital.

Q. Now, Mr. Bellamy, are you familiar with the rules of the operating department of the Southern Pacific Company? A. Yes, sir.

(Conversation among counsel out of hearing of Reporter.)

Q. (By Mr. Digardi): Mr. Bellamy, at the time you were injured, were you conducting the movements in accordance with your regular duties?

Mr. Phelps: Objected to as calling for the conclusion of the [21] witness, if Your Honor please.

Mr. Bledsoe: We join in that objection, opinion and conclusions.

The Court: I think so. Better reframe the question.

Q. (By Mr. Digardi): Mr. Bellamy, are you familiar with the rules of the railroad company with respect to the operation of trains in switching movements?

(Testimony of William A. Bellamy.)

Mr. Phelps: It has been asked and answered.

A. Yes, sir.

Q. (By Mr. Digardi): Are you familiar with the custom and practice followed by the railroad in carrying out switching movements such as the one we are involved in here?

Mr. Bledsoe: Well, object to that on the ground it is not binding on our defendant, if the Court please, in any event.

The Court: Well, I will admit the testimony in so far as the defendant Southern Pacific is concerned.

Mr. Phelps: We object, if Your Honor please, on the ground that is incompetent, irrelevant and immaterial what the custom and practice was. The question was, What was being done on this particular occasion by this man.

Mr. Digardi: My purpose, Your Honor, is to show that he was carrying out his duties in accordance with the custom and practice and therefore it will be necessary to show that he was familiar, to qualify him, with what the custom and practice was. [22]

Mr. Phelps: Then we will broaden the objection to state that—or enlarge upon the objection—that he is asking the witness to express an opinion as to what he was doing, whether he was doing it properly and so forth, which is a matter for the jury; and also calling for his opinion and conclusion.

(Testimony of William A. Bellamy.)

Mr. Digardi: If Your Honor please, this man—I am qualifying him now as an expert on that subject, and his opinion would be competent and relevant and material.

The Court: Well, I don't think it is necessary for you to go that far. You can ask him what the custom and practice was and then ask him what he was doing.

Mr. Digardi: Thank you, Your Honor.

Q. Mr. Bellamy, what was the custom and practice of the head brakeman in such a movement as this?

Mr. Bledsoe: We will make the same objection to this line of questioning, as not being binding upon my defendant.

The Court: Well——

Mr. Phelps: And we want to note, if Your Honor please, the objection that it is incompetent, irrelevant and immaterial as to what the custom and practice of other people were unless there is——

The Court: Well, I have overruled that objection before; I will overrule it a second time. Let's go ahead now.

Q. (By Mr. Digardi): Will you answer the question, Mr. Bellamy?

A. Could you repeat the question? [23]

Q. What is the custom and practice of the head brakeman—I will reframe the question.

What are the duties of the head brakeman in such a switching operation?

(Testimony of William A. Bellamy.)

Mr. Phelps: Well, now, I will have to object. That is another question and is calling for the opinion and conclusion of the witness as to what his duties were. The other question is as to custom and practice. Your Honor has ruled on that.

The Court: I will overrule that one, too. So go ahead.

Q. (By Mr. Digardi): What is the duty of the head brakeman with respect to such a switching movement?

A. The duty of the head brakeman is to work between the engineer and the crew, pass signals from the rear end to the engineer, and align the switch after the car has gone over, the last switch. The switch would be the head brakeman's—

Q. Mr. Bellamy, in order to pass signals to and from the engineer and to and from the other trainmen, where had you in this particular instance, where were you required to take a position?

Mr. Phelps: Object, if Your Honor please, that that is without foundation. He has included in the question "pass to and from." There is no evidence of any necessity of passing a signal from the engineer to the crew. His testimony, exactly, was "from the rear end to the engineer."

The Court: Well, I think you ought to lay more of a [24] foundation.

Mr. Phelps: It is without foundation, it is too broad.

(Testimony of William A. Bellamy.)

Q. (By Mr. Digardi): Mr. Bellamy, is the track here straight or curved? A. Curved.

Q. Was it possible with such a curve as this for the engineer to see the man on the rear end of the cut?

Mr. Bledsoe: Objected to as calling for his opinion and conclusion; he wouldn't know what the engineer could or couldn't see.

Mr. Phelps: Same objection.

The Court: Better reframe that and ask him what was possible for him to see.

Q. (By Mr. Digardi): Mr. Bellamy, from your position when you were on the side of the car before you dropped off, were you able to keep in view both the engineer and the men on the rear end of the cut? A. No, sir.

Q. And in order to keep them in view, what did you do?

Mr. Bledsoe: We will object to that as leading and suggestive as to why he did something.

Mr. Phelps: Same objection, if Your Honor please. What he did is important.

Mr. Digardi: That is what I asked him, what he did.

The Court: That is just what he asked him—in order to do [25] that, what did you do? is the question. I will overrule it. Proceed.

Q. (By Mr. Digardi): What did you do, Mr. Bellamy?

A. I got on the ground in order to be where I

(Testimony of William A. Bellamy.)

could move at a distance, where I could have both crews in view.

Q. Could you have taken any other position and still have seen both the engineer and the men on the rear end and passed signals? A. No, sir.

Mr. Bledsoe: Same objection; calling for the opinion and conclusion.

Mr. Phelps: Same objection.

The Court: I will overrule the objection.

Q. (By Mr. Digardi): Will you answer the question? A. No, sir.

Q. Mr. Bellamy, at the point where you crossed over onto the highway, what is the situation with respect to how far the road comes up to the railroad track?

A. The road comes up to the track—it is a road all the way up to the track.

Mr. Phelps: There will be an objection, if I may state it, to these rules. It is without foundation at the present time, if Your Honor please. Much of it is immaterial, nothing to do with this. What are you particularly interested in? Show me what you want. [26]

(Conversation between Messrs. Digardi and Phelps out of hearing of Reporter.)

Mr. Phelps: All right, no objection to that.

(Further conversation among counsel.)

Mr. Phelps: Well, I would have an objection to that part, but I will have no objection to the first,

(Testimony of William A. Bellamy.)

if you want to read it. Then I will state my objection to this.

Mr. Digardi: First I would like to read Rule 7-A of the Rules and Regulations of the Transportation Department of the Southern Pacific Company.

Mr. Bledsoe: May it be understood that these rules are not binding on the defendant Pacific Portland Cement, Your Honor?

The Court: Yes, that is correct.

Mr. Digardi: Rule 7-A:

“When practicable, all signals by hand must be given on the engineer’s side.”

And then there is some further part of the rule which is not applicable to this situation.

Mr. Phelps: And then if I may show the Court—perhaps that would be best—so I may make my objection to the part he now reads. May I do that and approach the bench?

The Court: Yes.

(Conversation among Court, Messrs. Digardi and Phelps at the bench, out of hearing of Reporter.)

The Court: I have seen that. Now, you may state what that [27] is for the record.

Mr. Phelps: If Your Honor please, for the record I would like to state an objection to the portion of Rule 7-B which counsel proposes to read, which is the last sentence of the second paragraph of Rule 7-B on page 13. The objection is that it is

(Testimony of William A. Bellamy.)

without foundation at this time; that it, by its terms, can only apply where signals are being given by the man at the particular time. There is no evidence that this man at this time was giving any signals or that there weren't also signals being given by someone else and that this rule does not apply unless all men from whom signals are given disappear from view.

The Court: Well, you say it is without foundation. You don't make any point that that particular rule to which you are now objecting, to the introduction into evidence of which you are objecting, is part of the rules?

Mr. Phelps: Oh, no, Your Honor, certainly. It is just without foundation and not applicable under the present state of the evidence.

The Court: Well, I will admit it.

Mr. Bledsoe: Yes, Your Honor.

Mr. Digardi: This is Rule 7-B, the Rules and Regulations of the Transportation Department of the Southern Pacific Company. And I am reading the last sentence in the second paragraph of the rules: [28]

“In backing a train or cars or shoving cars ahead of engine, the disappearance from view of trainmen or lights by which signals are given will be construed as a stop signal.”

(Conversation between Messrs. Digardi and Phelps out of hearing of Reporter.)

(Testimony of William A. Bellamy.)

Mr. Phelps: Again, I don't think it is applicable, but I won't even make an objection. Go ahead.

Mr. Digardi: This is the last paragraph, Rule 104-C, of the Rules and Regulations of the Transportation Department of the Southern Pacific Company:

“An employee alighting from a moving train to change position of a switch behind such train must get off rear of car when practicable, or when not practicable, on opposite side of track from switch stand unless it is unsafe to do so. While a train is moving over a switch, any employee in the vicinity of such switch must take position on opposite side of track from switch stand when practicable, and when not practicable to do so, must take position not less than 20 feet from the switch stand.”

Q. (By Mr. Digardi): Now, Mr. Bellamy, I am pointing to Plaintiff's Exhibit No. 6. There is indicated on there “switch.” Is that the location of the switch stand and the switch that you were intending to line after the train had passed over?

A. Yes, sir. [29]

Q. Now, Mr. Bellamy, when you were struck by this truck, were you rendered unconscious?

A. No, sir, I would say not.

Q. What was your condition?

A. Well, I was very much dazed and I was in a lot of pain.

Q. Were you bleeding or otherwise?

A. Yes, sir, I was bleeding.

(Testimony of William A. Bellamy.)

Q. Where were you bleeding from, what part of your body? A. From the arm.

Q. And will you describe what your condition was generally as you were lying there?

A. Well, I was very much dazed and in a lot of pain in so far as—I was unable to move very much and I wasn't allowed to move very much. The crew wouldn't let me move.

Q. Do you recall how long you lay there?

A. Not very long, I don't think.

Q. Were you taken away? A. Yes, sir.

Q. How were you taken away?

A. In the ambulance.

Q. And where were you taken?

A. To the Redwood—to the Palo Alto Hospital in Redwood.

Q. Palo Alto Hospital in Redwood City?

A. I believe that is the name of it, yes, sir.

Q. Did you stay there long? [30]

A. Not very long.

Q. About how long?

A. Well, it would be hard to estimate. A couple or three hours, I would say.

Q. What was done for you there?

A. It may have been a tourniquet put on the arm and examined, was the biggest thing.

Q. Where were you taken from there?

A. Southern Pacific Hospital in San Francisco.

Q. And what was your condition when you arrived there, Mr. Bellamy?

(Testimony of William A. Bellamy.)

A. Well, I was in very bad condition when I arrived at the Southern Pacific Hospital. They was—was unable to move myself.

Q. How were you taken there from Redwood City? A. In an ambulance.

Q. What was done for you when you arrived there?

A. Shortly after I arrived there, I had an operation on the arm. I was put to sleep and that is about as far as I remember that night.

Q. And what is the next thing you remember?

A. It was the next day some time, there in the hospital. But so far as that night, I was put to sleep and operated on my arm.

Q. Were you subsequently prepared for a further operation? A. Yes, sir. [31]

Q. Were you taken to the operating room?

A. Yes, sir.

Q. How far did that operation progress?

A. The anesthetic—I had had the anesthetic, but I had never been knocked out, put to sleep, so the doctor came in, examined me, and says, “There’s a man not able to take the operation——”

Mr. Phelps: Well, if Your Honor please, no statement of the doctor should be in.

The Court: Yes, the statement of what the doctor said may go out. The jury is instructed to disregard it.

Q. (By Mr. Digardi): Were you operated on at that time? A. No, sir.

(Testimony of William A. Bellamy.)

Q. What was done for you?

A. I was then carried back to my bed in the room.

Q. Were X-rays taken of you during the first few days you were in the hospital?

A. Yes, sir, I had several different X-rays.

Q. Subsequently were you put in some kind of a cast or bandage of some type?

A. Yes, sir, what they call a Figure 8, in the hospital.

Q. How long did you remain in the hospital on that occasion?

A. Near three and a half weeks.

Q. And at the end of the three and a half weeks, what was done with you?

A. I came to my room at the end of three and a half weeks, and [32] I was in my room.

Q. What was your condition at that time?

A. I was wearing the Figure 8 and I was still having a lot of pain, and I had a lot of trouble sleeping at nights.

Q. What did you do, were you able to be up and walk around?

A. I could be up, yes, sir.

Q. Did you go out to eat meals or did you eat them in your room?

A. I could go out to get my meals.

Q. How long did this continue?

A. Approximately six weeks, I would say.

Q. At the end of six weeks, what did you do?

A. I went back to the hospital.

(Testimony of William A. Bellamy.)

Q. What was done for you at that time?

A. The Figure 8 removed.

Mr. Digardi: Would you mark these?

(Documents marked for identification by the Clerk.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 8 for identification and ask you who does that picture show. A. That shows myself.

Q. And will you tell us what it shows?

A. It shows a laceration on the arm, it shows a Figure 8 bandage.

Q. It shows that. I show you Plaintiff's Exhibit 9 for identification and ask you what that photograph shows. [33]

A. That shows a Figure 8, also the arm.

Q. I show you Plaintiff's Exhibit 10 for identification and ask you the same question.

A. That shows the Figure 8.

Q. And Plaintiff's Exhibit 11?

A. That shows a Figure 8.

Q. And Plaintiff's Exhibit 12 for identification?

A. That shows a cut on the arm and Figure 8.

Mr. Digardi: We offer in evidence Plaintiff's Exhibits 8 through 12, inclusive, Your Honor.

The Court: Any objection?

Mr. Phelps: No objection.

Mr. Bledsoe: No objection.

Mr. Digardi: I would like to show them around and pass them to the jury.

(Testimony of William A. Bellamy.)

(Thereupon Plaintiff's Exhibits No. 8 to 12, previously marked for identification, being photographs of plaintiff, were received in evidence and passed to the jury for examination.)

Q. (By Mr. Digardi): Mr. Bellamy, with respect to the laceration on your arm, was that a deep or a superficial wound?

A. It was a deep wound.

Q. Now, after the Figure 8 was removed from your arm and shoulder, what was done for you?

A. I am back to me room and reported to the hospital for physiotherapy treatment after [34] that.

Q. For how long a period were you given physiotherapy treatments?

A. Six weeks, approximately.

Q. Will you describe briefly what that treatment consisted of?

A. Consisted of heat and massages.

Q. At the end of the six weeks' treatment, what was done—six weeks' physiotherapy, what was done? A. Not anything more after that.

Q. Have you received any further treatment from the Southern Pacific Hospital?

A. No, sir.

Q. Have you been discharged from the hospital?

A. No, sir.

Q. Have you returned to the hospital on various occasions since the termination of the physiotherapy treatment?

(Testimony of William A. Bellamy.)

A. I reported twice—once every two weeks up until the last two months. I have got a month leave at the time, the last two months.

Q. Are you on leave since and at the present time from the hospital? A. Yes, sir.

Q. Mr. Bellamy, what is your present condition? Let's begin with your arm. Will you describe the condition of your left arm at the present time?

A. This arm is very weak and nervous and numb feeling on this [35] part of the arm from the laceration down (indicating).

Mr. Digardi: He is indicating the upper side of the left forearm from the point of the laceration down.

Q. What is the condition of your left arm with respect to ability to move it up and down at the shoulder joint?

A. I have a limited motion of the arm and shoulder.

Q. Mr. Bellamy, will you rise—just stand up and raise your two arms to their fullest extent, demonstrating to the jury your ability to rise, to raise your two arms to their fullest extent?

A. (Witness complied.)

Q. And now, Mr. Bellamy, would you put your arms in front of you and raise your arms to the fullest extent? A. (Witness complied.)

Q. Thank you. You may be seated. Mr. Bellamy, with respect to your neck, do you have any difficulty with that? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Will you describe that?

A. I have a lot of pain in the back of my shoulder and neck, and have a lot of headaches at night in the back of my head and neck, and my neck is kind of stiff.

Q. Are you able to turn the head to the full range of motion?

A. I would say so, by kind of forcing it. It is stiff, and I kind of have to force it.

Q. Now, with respect to your chest, Mr. Bellamy, do you have [36] any difficulty?

A. Yes, sir, I have soreness in my chest and coughing and sneezing. I have a lot of pain in my chest in the low part of the chest.

Q. With respect to your low back, do you have any difficulty?

A. Yes, sir. Not so much as I have had with the lower part of my back.

Q. Will you describe that difficulty?

A. Well, I have had a lot of pain in the lower part of my back, kind of stiffness.

Q. Mr. Bellamy, are you able at the present time to return to your duty as a railroad brakeman?

Mr. Phelps: Objected to as calling for the opinion of the witness.

Mr. Digardi: I think the witness is the best man to know whether he is able to do his work.

The Court: I will allow it.

Q. (By Mr. Digardi): Will you answer the question, Mr. Bellamy? A. No, sir.

(Testimony of William A. Bellamy.)

Q. Now, Mr. Bellamy, with respect to the details of the duty of a railroad brakeman, will you describe in some detail what your duties entail?

A. It consists of switching out cars, setting brakes.

Q. You have to climb up and down boxcars?

A. Climb boxcars, yes, sir, setting brakes, kicking off brakes, [37] and pulling the pins and—

Q. Are you required to get on and off moving cars? A. Yes, sir.

Mr. Digardi (To Clerk): Will you mark those?

Q. Mr. Bellamy, are you in pain at the present time?

A. I have pains at nights with my head and back and shoulders. I don't sleep at night, but a short while at a time, and I wake all through the night with my head and shoulders, mostly my head and neck. [38]

* * *

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 13 for identification. Will you tell us what that photograph shows?

A. I will have to put on my glasses. That shows the highway, this shows the track, and that shows the boxcar.

Q. Is this the shed that is shown and marked "shed" in Plaintiff's Exhibit No. 6?

A. Yes, it is.

Q. And what direction is this, looking down the highway from what direction?

(Testimony of William A. Bellamy.)

Mr. Phelps: Is that in evidence yet?

Mr. Bledsoe: Yes. It is being exhibited to the jury. I might want to make some objection to some of those pictures.

The Court: Well, I think you should just have it identified in a general way by the witness.

Mr. Digardi: I might give him the whole group and ask him if these views of it are the scene of the accident generally.

The Court: Approximately. And then you can go over each one after you put it in evidence.

Q. (By Mr. Digardi): Mr. Bellamy, would you look over these pictures? I think you have already seen them, Mr. Bellamy—those pictures?

A. Yes, sir, I believe I have seen them before.

Q. Were you present when those photographs were taken? [41] A. Yes, sir.

Q. Do they in general show the scene of the accident in question there? A. Yes, sir.

Mr. Digardi: If Your Honor please, we offer in evidence Plaintiff's Exhibits 14 through 23.

The Clerk: 13 through 23, counsel.

The Court: They may be admitted.

(Thereupon Plaintiff's Exhibits for identification No. 13 through 23, being photographs of the scene of the accident, were received in evidence.)

Mr. Phelps: Preliminarily, may I ask Mr. Digardi when those pictures were taken?

(Testimony of William A. Bellamy.)

Q. (By Mr. Digardi): Could you tell us when those pictures were taken?

Mr. Hepperle: I believe I can answer that, Your Honor. They were taken Saturday afternoon by me.

The Court: Now, I would suggest—we are going to take a recess for ten minutes. I suggest you hand those to counsel for the defendants so that they can make objection to any ones that they see fit. Then you may have to lay further foundation for these, or to those that they object to. Is that satisfactory to you gentlemen?

Mr. Bledsoe: Satisfactory, Your Honor.

Mr. Phelps: Yes, Your Honor. [42]

Mr. Digardi: Thank you, Your Honor.

The Court: We will take a brief recess. During the recess bear in mind the admonition the Court has heretofore given you. Ten minutes.

(Recess.)

Mr. Digardi: Mr. Bledsoe, you had some objection?

Mr. Bledsoe: With reference to some of these pictures that have a man in them, we want to object on the ground that they are apparently an attempt to reenact the position of the plaintiff at certain stages in the accident and are self-serving. Then I think one or two of the pictures show a speed limit sign of 35 miles an hour, which I understand wasn't there at the time of the accident.

Mr. Digardi: That is correct. We have agreed

(Testimony of William A. Bellamy.)

that that can be stipulated that the speed limit sign on the side of the road and upon that highway was not there at the time of the accident. It has been placed subsequent to that time.

The Court: All right: I will admit these with the exception of the figure of the man, and then you can lay a foundation by the testimony of this witness or any other witness to show that figure is approximately the correct position——

Mr. Phelps: We join in the objection. I presume, counsel, these are not intended to depict the scene at the time of the accident but just for general purposes?

Mr. Digardi: They are for general purposes of illustrating [43] the scene, not at the time of the accident; they were taken last Saturday.

Q. I show you Plaintiff's Exhibit No. 13 for identification and ask you whether or not that shows Harbor Road looking from the east toward the west. A. Yes, sir.

Q. I am indicating a shed in the right hand corner. What is that shed?

A. The Paraffine plant.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit 13 for identification.

If Your Honor please, some of these pictures have a figure in them but the figure has no reference to anything in the accident.

Mr. Bledsoe: I won't object to it with that statement of counsel. Will you indicate that for us?

(Testimony of William A. Bellamy.)

The Court: That is admitted.

(Plaintiff's Exhibit No. 13 for identification was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 14 for identification and ask you generally what that shows.

A. That shows the highway.

Q. Looking from what direction? [44]

A. I think it would be——

Q. Looking from the east toward the west?

A. Yes, sir.

Q. Mr. Bellamy, there is a figure in that picture. This one, Your Honor, we would like to show what the figure indicates.

The Court: You might ask him a question about it.

Q. (By Mr. Digardi): Mr. Bellamy, I show you a picture of a man in the center right hand side of the picture. Does that indicate anything to you?

A. This show about where the switch is.

Q. This man is standing about opposite the switch? A. Yes.

Q. Can you indicate where the switch is?

A. Right there.

Mr. Phelps: Your Honor will understand and appreciate I have difficulty unless counsel shows me the picture that he is going to show as he does it. I have no doubt about what he is showing the witness now. If you do that, I think we can progress faster.

(Testimony of William A. Bellamy.)

Mr. Digardi: There is a man standing opposite the switch.

Mr. Phelps: Will you do that, Mr. Digardi? Then I think we can hurry on.

Mr. Digardi: This picture shows a man standing——

Mr. Bledsoe: Who is that man? Is that Bellamy? [45]

Mr. Digardi: That is Mr. Bellamy. I will mark an X at the location of the switch as pointed out by Mr. Bellamy.

The Witness: Yes.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit No. 14 for identification.

Mr. Bledsoe: We have no objection.

The Court: Let me see that. You don't mean for identification.

Mr. Digardi: In evidence, Your Honor.

(Plaintiff's Exhibit No. 14 was thereupon received in evidence.)

Mr. Phelps: Is this for the purpose of showing——

Mr. Digardi: Of showing where the switch is.

Q. I show you Plaintiff's Exhibit 15 for identification and show you the figure of a man standing there. Would you point out the switch in relation to that man? A. Here, across the track.

Q. Which direction was this picture taken from?

A. This would be the east facing west.

(Testimony of William A. Bellamy.)

Mr. Digardi: I will mark the location of the switch as indicated by the witness.

We offer that in evidence as Plaintiff's Exhibit No. 15.

Mr. Phelps: I have no objection to 16 going in.

Mr. Bledsoe: I have none. [46]

The Court: Admitted.

(Plaintiff's Exhibits No. 15 was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 16 for identification. This picture shows two railroad tracks. Will you indicate which, if any of those, is the main line of railroad?

A. This is the main line, this track here.

Mr. Digardi: I will indicate a figure M indicating main line, and a letter S, indicating the spur track.

The Court: I suggest that you start to pass these that have been admitted to the jury now so that they will get some idea where they are.

Mr. Digardi: They are on the counsel table, Your Honor. They wanted to look at them.

Mr. Bledsoe: No, these have not been admitted in evidence.

The Court: I mean those that have already been admitted in evidence.

Mr. Digardi: These are the ones that are in evidence that the jury hasn't seen. We offer in evidence Plaintiff's Exhibit No. 16.

(Testimony of William A. Bellamy.)

(Plaintiff's Exhibit No. 16 was thereupon received in evidence.)

Mr. Phelps: No objection to 17. Stipulate it goes in.

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 17 [47] showing two lines of railroad. Will you indicate which of those is the main line?

A. This would be the main line.

Q. And which is the spur track?

A. This is the spur track.

Mr. Digardi: I indicate with M main line, and S, spur track.

Q. Mr. Bellamy, on this Plaintiff's Exhibit No. 17 could you indicate on that the location of the point where you dropped off of the train?

A. It would be near there some place (indicating).

Mr. Digardi: I indicate that point marked B-1, indicating the point where Mr. Bellamy dropped off.

We offer in evidence Plaintiff's Exhibit 17.

(Plaintiff's Exhibit No. 17 was thereupon received in evidence.)

Mr. Bledsoe: No objection to that (referring to photograph).

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 18 and ask you which of those is the main line and which is the spur track.

A. That is the main line. That is the spur track.

(Testimony of William A. Bellamy.)

Mr. Digardi: Indicating M for main line and S for spur track.

Q. Does the switch stand show in that picture?

A. Yes, sir (indicating). [48]

Mr. Digardi: I will mark an X at the location of the switch stand.

We offer in evidence Plaintiff's Exhibit 18.

(Plaintiff's Exhibit No. 18 was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 19 which shows the picture of a man standing on the highway. Could you tell us what that indicates?

Mr. Bledsoe: We will object to this on the ground that it is a self-serving statement and no proper foundation laid for it.

Mr. Digardi: I don't think the witness has answered the question.

Mr. Phelps: The objection is it is self-serving; it was taken out of court; we were not present, with his own counsel. He can testify what he did without having to bring in self-serving pictures.

The Court: If he can lay the foundation that it depicts approximately where he was standing at the time of the accident, according to him, at the time of the accident, I will permit it.

Q. (By Mr. Digardi): What does that figure indicate, Mr. Bellamy?

A. It indicates a man standing on the highway near the track.

(Testimony of William A. Bellamy.)

Q. Does that indicate anything specially to you, the location of the man? [49]

A. It indicates approximately where the man was struck in the position he is.

Q. Who is the man in the picture?

A. That is myself.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit No. 19.

Mr. Phelps: Our objection is noted.

Mr. Bledsoe: Same objection.

The Clerk: Is this admitted, Your Honor?

The Court: Yes.

(Plaintiff's Exhibit No. 19 was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 20 and ask you what that indicates.

A. That indicates a man just somewhere near the scene of the accident, about approximately where the man was standing.

Q. Which direction is this picture taken from?

A. This would be the west facing east.

Q. (By Mr. Digardi): Plaintiff's Exhibit No. 20 indicates a sign showing the speed limit 35 miles an hour, which was not there at the time of the accident.

The Court: All right. So far as Plaintiff's Exhibit No. 20 is concerned, ladies and gentlemen, disregard the sign "35 miles an hour"; it was not there at the time of the accident.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit No. [50] 20.

(Testimony of William A. Bellamy.)

(Plaintiff's Exhibit No. 20 was thereupon received in evidence.)

Mr. Phelps: We will have an objection to 21, if Your Honor please, on the ground that this picture identified for identification was not taken as of the date of the accident, and this condition was not present at the time of the accident. Unless the purpose is only for general illustration, I think it should not be admitted.

Mr. Digardi: We will withdraw that one anyway.

The Court: Not admitted.

The Clerk: 21 is marked only for identification.

Mr. Digardi: We will not offer 22 and 23 at this time.

The Clerk: 21, 22 and 23 are marked for identification only.

Mr. Digardi: That is correct. [51]

* * *

Cross-Examination

By Mr. Phelps:

Q. Mr. Bellamy, the line that you have referred to, the track, as the main line to the harbor, you don't mean to indicate by that that that is the main line of the Southern Pacific Company that goes down the Peninsula?

A. The main line to the harbor. No, sir, it is not the main line of the Southern Pacific at all.

(Testimony of William A. Bellamy.)

Q. In other words, there are no passenger trains that run on there? A. No, sir.

Q. That is a simply a switching track?

A. Yes.

Q. In other words, what you fellows call the main line, it is nothing more or less than a lead to the industries? A. That is right.

Q. And only freight cars go on that?

A. Yes, sir. [53]

Q. And when you continue on what you call the main line to harbor, you continue on to that Pacific Portland Cement plant which is away out at the end of there and by the Bay where the ships come in, is that right? A. Yes, sir.

Q. And this road that parallels it is the road that serves that? A. Yes.

Q. Serves the Pacific Portland Cement Company? A. Yes.

Q. Did you say that that was a heavily traveled road?

A. Well, a good bit of traffic on the road, yes.

Q. At the time of this accident, that is something you knew, isn't it?

A. Yes, sir, I know.

Q. You knew that it was a heavily traveled road and that you could expect cars in either direction, and trucks, is that right? A. Yes, sir.

Q. Now, then, the spur that you have indicated here as the paraffine spur, that is the track that you were pulling out on at the time of your accident, is that right? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. And you had been in there. When you went in there you went in, you say, with a car ahead of the engine? [54] A. Yes, sir.

Q. You are pretty sure of that? A. Yes.

Q. Are you pretty sure that you had three cars when you came out?

A. Three cars, yes, sir, I am pretty sure of that.

Q. Could there have been two?

A. To the best of my knowledge, there was three cars.

Q. And one of those cars you were pulling out is what you fellows call a baby load, is that right?

A. Yes, sir, that is right.

Q. A baby load, so the jury will know, is a load that was partially loaded but the load had not been completed so the doors weren't closed and there was further loading to be done on that car, is that right? A. Yes, sir.

Q. You were to put that car back right in on that same track?

A. That is my understanding.

Q. Now, then, on this move down, had you been all the way down to the harbor or not before this?

A. No, sir, we hadn't.

Q. So that you had come then immediately from Redwood City? A. Yes, sir.

Q. Done some switching work there?

A. Yes, sir. [55]

Q. Then you had crossed the Bayshore with

(Testimony of William A. Bellamy.)

one car ahead of the engine and two behind it?

A. Yes, sir.

Q. And had then gone into this paraffine spur; that was the first work that you did after you crossed the Bayshore?

A. Yes, sir.

Q. After you crossed the Bayshore and went in here, what work did you yourself do with reference to the work that was being done when you made a joint, or whether you did when you went on that spur, before you pulled out of the spur?

A. The joint was practically all the work that was to be done and pull out.

Q. Did you make the joint between the two cars that were in there and the car ahead of the engine?

A. Yes, sir, I was helping making the joint.

Q. You say you helped. Was there somebody else did it with you?

A. The crew was there. The chances are they were there working with me.

Q. Do you remember what you were doing in there before the move out?

A. Making the joint.

Q. Well, by that do you mean that you gave the signals to the engineer or did somebody else, or do you know?

A. As well as I remember, I gave the signals.

Q. That was you joined up?

A. Yes, sir.

Q. After you made that joint, after the cars

(Testimony of William A. Bellamy.)

coupled up,—by the way, were the two cars that were in there coupled up?

A. As well as I remember, the two cars were coupled. I wouldn't be positive about that.

Q. Could they have been spotted for loading at various doors so that they were not coupled up?

A. Yes, sir, they could have been.

Q. So that there were some other joints to be made then before you came out?

A. I wouldn't be positive whether there were other joints or not.

Q. When you came out of there, you say that you were riding on the short ladder, is that right?

A. Yes, sir.

Q. That would be the ladder next to the pilot?

A. Yes, sir.

Mr. Digardi: What is the pilot, counsel? May we have that explained?

Mr. Phelps: Yes.

Q. Will you tell us what the pilot is?

A. That is the front of the engine.

Q. Cowcatcher?

A. Yes, sir, the steps where you step up on one.

Q. That is the cowcatcher part of the engine?

A. Yes, sir.

Q. And it was a backup movement that would place your engine there on which side?

A. That would place the engine there on the right side.

Q. In the direction of the movement or not?

(Testimony of William A. Bellamy.)

A. The direction of the movement would be a backup movement.

Q. So the engineer doesn't reverse positions, of course?

A. No, sir, he doesn't reverse the side of the engine at all.

Q. You will have to understand that we have to get this picture over so everybody can understand.

A. Yes, sir.

Q. The engineer stays in the same position, he doesn't reverse his positions when he backs out?

A. No, sir.

Q. He doesn't have controls on both sides of the engine?

A. No, sir.

Q. When you come in there, you are ahead of him and when you come out the engineer is still on the same side?

A. Still on the same side.

Q. So far as the fireman is concerned, he has nothing to do with the control of the engine so far as the brakes or any throttle or anything of that kind?

A. No, sir.

Q. You mean, no, sir, he does not, or no, sir I am wrong? [58]

A. He doesn't have control of the brakes, of the movement of the train.

Q. When you were coming out of there and as you were coming out and were riding along there, do you remember, Mr. Bellamy, where the other members of your crew were?

A. I couldn't say the exact spot where the other

(Testimony of William A. Bellamy.)

members were. Some of them were on the cut and some of them on the ground; I wouldn't say.

Q. What do you mean by on the cut?

A. That is the car that was ahead of the engine.

Q. By the cars ahead of the engine, because you are in a backup movement, do you mean the east side of the engine, the pilot side of the engine?

A. Yes, sir, that would be the cut of cars.

Q. That would be the end in towards the spur?

A. Yes, sir.

Q. And you say some of them were on the cut and some were not, is that right?

A. Yes, sir.

Q. What is your memory of who was on the cut?

A. Well, the best of my memory was Quinlan and Husson; I wouldn't be positive whether they both caught the cut, or whether there was one of them on the ground, but to the best of my recollection, Quinlan caught the cut of cars.

Q. Quinlan was the what? Rear brakeman?

A. He was the rear brakeman.

Q. So then he was on the rear end of that cut as it was going out? A. Yes, sir.

Q. The trailing end in the direction of the backup movement, is that right? A. Yes, sir.

Q. Where was Husson? Was he riding a car in between him and you, or do you know?

A. I believe Husson caught the car there near each other, and just short space in between the cars. As well as I remember, they both——

(Testimony of William A. Bellamy.)

Q. That is your recollection of it?

A. Yes, sir.

Q. That was what you saw?

A. I wouldn't be positive whether they was both on that cut of cars or not.

Q. What position in the crew was Mr. Husson?

A. Mr. Husson?

Q. Yes.

A. He was near the—near the rear man, and as well as I remember, they both caught the car there.

Q. No; you don't understand my question.

A. I guess not.

Q. What position on the crew was he, Mr. Bellamy? [60]

A. He was what we call the tag man. He is the man that carries the switch list.

Q. Is he the swing man or the tag man?

A. Swing man or tag man, that is right.

Q. Once again, so we will get all our terms, the swing man works between the head man and the rear man, is that right?

A. Yes, he is the man with the switch list, that tells which cars go on.

Q. He is checking the cars to see whether you pulled the right cars and where those cars are going?

A. Yes.

Q. He assists the conductor in that respect?

A. In that respect.

Q. As you were coming out of there, and after you were in a movement backing up and riding

(Testimony of William A. Bellamy.)

along on this ladder, you detrained. Can you tell us where with reference to the frog?

A. Would you state that question again, please?

Q. You got off the train, Mr. Bellamy; as you were coming out, you stepped down off the train?

A. Yes, sir.

Q. You were riding on the boxcar on the short ladder, but you were facing at the time you got off in the direction of the engineer, weren't you?

A. I had been facing the crew coming out.

Q. Let's go back a step then. As you were coming out on that [61] ladder, you say you were facing the crew, is that right?

A. I had been facing the crew coming out.

Q. Mr. Bellamy, before you got off the boxcar, didn't you turn around so that you were then facing the engineer—and this is while you were still on the ladder?

A. No, sir. Could I kind of explain that?

Q. Well, if you can, I want you to, certainly, but first, can you answer that question one way or the other and then explain all you want?

A. I was facing the crew when I let loose of the ladder, just about the time I was supposed to let loose of the ladder and light on the rground.

Mr. Bledsoe: May I have that answer read?

(Answer read.)

Q. (By Mr. Phelps): What part of the crew, Mr. Bellamy? Do you mean the men in the direc-

(Testimony of William A. Bellamy.)

tion towards the harbor or do you mean the engine crew in the opposite direction?

A. I was facing the train crew just as I stepped off the car onto the ground I turned towards the road, the highway and facing the engineer.

Q. All right. Now, if you will try to follow me. This is the boxcar here, let us assume.

A. Yes, sir.

Q. Let us assume there is a ladder here and you are holding on. The movement is in this direction so your engineer is [62] behind you; as you were riding along, you were riding along then leaning out, I take it?

A. Yes, sir.

Q. You never rode along on a boxcar without leaning out, did you?

A. That is right.

Q. When you were leaning out you were looking back in the direction for which the movement had come, is that right?

A. That is right.

Q. Back into the spur?

A. That is right.

Q. Were you looking in that direction as you dropped off?

A. No, sir.

Q. No. That is what I am saying. Didn't you turn around before you dropped off—turn around still on the ladder looking towards the engineer?

A. Yes, sir, I turned that way.

Q. You did turn around then before you dropped off and you were not facing the crew or in the direction from which this car came at the time you dropped off, isn't that true?

A. Yes, sir, that would be true.

(Testimony of William A. Bellamy.)

Q. For how long a distance did the car come out of the spur after you had turned your back to your crew, which was towards the harbor?

A. Could you repeat that again? [63]

Q. Certainly, certainly. Any question you don't understand, you just don't hesitate to speak right up.

A. Yes, sir.

Q. I will withdraw it and put it a little simpler. As you were coming out, you have told us now that you turned towards the engineer. How far did the boxcar travel after you turned around with your back towards the crew?

A. How far did the boxcar travel?

Q. How far did the boxcar move?

A. Just as I turned, I let loose of the boxcar and that was——

Q. Did it go any distance at all? Did you turn immediately——

A. Yes, sir, I dropped loose immediately.

Q. It didn't go a matter of even a foot, you think?

A. The boxcar kept moving, yes, sir.

Q. It moved some distance while you adjusted your position from leaning out this way in the direction of the crew until you turned around and got yourself firmly stanced in the direction of the other way, didn't it?

A. It was only a matter of just turning my body and my head, yes, sir.

Q. You had to shift your feet, didn't you, before you got off?

(Testimony of William A. Bellamy.)

A. No, sir, my feet was on the steps.

Q. Didn't you have to shift your feet now, Mr. Bellamy? You have been a railroad man a good many years, you say.

Mr. Hepperle: Objected to as asked and answered and as [64] quibbling.

The Court: I didn't hear the question.

Mr. Phelps: I haven't had a chance to ask it, Your Honor.

Q. Didn't you have, before you got off the train, to change your feet so as to put them firmly on the step so that you dismount this way?

Mr. Hepperle: Objected to as asked and answered, Your Honor. The man has said he didn't have to change the position of his feet.

The Court: I will allow it because it is cross-examination. You can ask a question more than once.

Mr. Digardi: Answer the question, Mr. Bellamy.

A. No, sir, I didn't have to change positions of my feet no more than just a swing on the ball of the foot.

Q. (By Mr. Phelps): Just a swing of the ball of the foot. As the car was moving, about how fast was it going, Mr. Bellamy?

A. Just a very slow rate of speed; it would be hard to estimate.

Q. Can you give us an estimate?

A. Oh, two, three, four miles—from two to—two or three miles an hour.

(Testimony of William A. Bellamy.)

Q. Two or three miles an hour? A. Yes.

Q. A perfectly normal switching movement as far as you were concerned? [65]

A. Yes, sir.

Q. And nothing wrong with the step or the stirrup or the ladder? A. No, sir.

Q. It didn't enter into this accident at all?

A. No, sir.

Q. As you stepped off, you didn't lose any footing or have any footing conditions that were any trouble, did you? A. No, sir.

Q. You didn't trip, stumble or fall?

A. No, sir.

Q. There was no jerk of the engine just as you got off? A. No, sir.

Q. Perfectly smooth movement?

A. Perfectly smooth.

Q. So that so far as you as a brakeman, so far as you getting off of the boxcar, you did it perfectly smoothly and routinely? A. Yes, sir.

Q. It wasn't until after you had gotten off of that and taken some considerable steps off into the highway that you were in this accident, is that right? A. That is right.

Q. When you stepped off and as you stepped off, you say that you looked into the direction of the engineer, is that right? A. Yes, sir. [66]

Q. And you walked, did you, upon the point where you got off in a diagonal direction out into the highway? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. And where you got off, Mr. Bellamy, you got off, whatever the point may be marked—and I might clear that just a second—whatever the point might be marked on this map by your counsel, you got off, did you not, in such a position so that when you got off you had to cross this track which is marked main line before you came to the highway, isn't that true?

A. One rail; just the one rail.

Q. So that where you stepped you stepped off between the rails of the two tracks, is that right?

A. That is the best of my recollection and memory.

Q. Now, then, one other thing, Mr. Bellamy. When you step off a boxcar, and on this occasion, directing yourself to this occasion, you step out away from the boxcar, don't you?

A. Not necessarily.

Q. You don't drop straight down; that isn't very safe practice, is it?

A. In a slow movement like that—

Q. You don't just simply drop down; you swing yourself away and get free; is that what every brakeman does, a natural reaction?

A. If it is an ordinarily slow moving train like that, you just step down with one foot. [67]

Q. Just step straight down?

A. You wouldn't reach away from it.

Q. You just drop right from your position on the side?

(Testimony of William A. Bellamy.)

A. Just an ordinary step like stepping off.

Q. So you do take a step out, don't you?

A. Yes, sir, you don't step right——

Q. You do step out so that you are not going to follow the cars which are moving?

A. Just an ordinary step down like stepping down off of a——

Q. Don't you, Mr. Bellamy, and didn't you on this occasion, step away from the cars, take one step at least away when you first let go?

A. From the car?

Q. Yes.

A. Yes, sir, I moved away from the car.

Q. So that you would have stepped away from the side of the clearance of the car. Your first step down stepped away from the car about how far? Three or four feet? A. No, sir.

Q. Two or three feet?

A. I have an idea when I stepped from the car it would be, the chances are, two feet.

Q. Two feet away. Was that with your left foot or right foot when you stepped down at that point two feet away from the car?

A. I couldn't be positive which one it was. [68]

Q. Didn't you step down so that with your arm out you were still with your arm extended out beyond for clearance from the side of the car?

A. You have clearance, yes, sir.

Q. So whatever distance it was from the side of the car, it would be the distance of your arm plus

(Testimony of William A. Bellamy.)

another foot or so where you stepped down first, isn't that right?

A. It wouldn't be that far because—on an ordinary step down like that.

Q. Well, do you remember this particular one? Isn't that about what it was?

A. It was only just a short way from the car; I couldn't be positive about that.

Q. When you stepped down, you say you stepped between the rails, just about midway, center between the rails, the center line of the track about, approximately?

A. The best I remember, I just stepped down near the outside rail, the nearest rail on the highway.

Q. How far from the nearest rail?

A. I would say near the rail.

Q. Well, how far is near? I am sorry.

A. Well—

Q. The best you can, please. A foot or two?

A. I would say six inches or a foot, somewhere; just to be safe in missing the rail—a foot. [69]

Q. Then you stepped over that rail?

A. That is the best of my remembrance.

Q. And then ran forward in the direction whence the engine was going and diagonally, is that right?

A. That is right.

Q. Out into the highway? A. Yes.

Q. About how many steps did you take from the

(Testimony of William A. Bellamy.)

time you first stepped down until the time you were hit?

A. It would be pretty hard to say. Ten, fifteen steps.

Q. About ten or fifteen normally running-walking steps? A. Maybe twenty.

Q. Fifteen or twenty steps? A. Yes.

Q. Sort of a running motion, was it, Mr. Bellamy? A. I would call it a running motion.

Q. You would call it running. Then from the time you stepped off of the car until the time you were hit, did you ever turn around to see whether there was anything coming from behind you?

A. Not after I hit the highway, no, sir, I hadn't time to turn around.

Q. I am not asking you that question; I am asking you if you looked, turned around and looked at all at any time not only after you hit the highway, but while you were still in a place of safety in between those two rails on the main line track. Did you turn and look then?

A. Yes, sir, I turned around.

Q. After you detrained, after you got off?

A. Not after I left the train.

Q. You didn't look around in the direction from which this truck was coming at any time after you got off? A. Not after, no, sir, after.

Q. Indeed at any time after you changed your position, on the side of the car from looking to-

(Testimony of William A. Bellamy.)

wards the crew to looking towards the engineer, is that right? A. That is right.

Q. Can you tell us about how far into the highway you were at the time you were struck?

A. It would be hard to say; approximately——

Q. Well, have you any way——

The Court: Let him finish his answer.

Mr. Phelps: I am sorry; go ahead.

A. Six or seven feet; from five to seven feet.

Q. And can you say with reference to the center line of the highway?

A. No, sir, I wasn't near the center line.

Q. Well, can you give us any idea how far?

A. In reference to the center line and the track, I would say approximately one-third or so from the distance from the center line to the car. It would be something near a third of the way [71] from the track to the center line.

Q. You mean by that the rail?

A. Yes, sir.

Q. All right. Now, at the point where you dropped down, the first step down and in a very slow, easy movement, only two or three miles an hour, at that point where you got down, you didn't step right onto the highway or any pavement there?

A. As well as I remember, I stepped between the ties. That is the best of my remembrance.

Q. That is the dirt between the ties, isn't it?

A. As well as I remember the step, yes, sir.

(Testimony of William A. Bellamy.)

Q. Do you know what part of the vehicle struck you? A. No, sir, I couldn't say.

Q. Did you ever see it? A. No, sir.

Q. Did you ever hear it? A. No, sir.

Q. Before you were struck, did you hear any noise at all indicating the presence of a vehicle?

A. No, sir.

Q. Did you hear the squeal of brakes?

A. No, sir.

Q. Did you hear anybody shout, anybody at all?

A. No, sir.

Q. Is there anything wrong with your hearing?

A. No, sir.

Q. Is there anything wrong with your eyesight?

A. No, sir.

Q. Do you wear glasses?

A. I wear glasses for reading, but at a distance my eyes are good.

Q. You weren't wearing glasses then?

A. No, sir, I only wear them for reading.

Q. Now, then, as you were hit, do you remember whether you were dragged at all by the vehicle or did you just fall right where you were hit?

A. I couldn't say.

Q. Do you know of your own knowledge?

A. No, sir, I don't.

Q. Did you feel or see any part of the vehicle go beyond you before the impact?

A. No, sir.

Q. You understand what I mean by that? Did

(Testimony of William A. Bellamy.)

you get any glimpse of the vehicle going beyond you before you were hit?

A. No, sir, I didn't get any glimpse of the vehicle.

Q. Did you hear the noise of the vehicle passing you before you were hit? A. No, sir.

Q. And at the time that you were hit, you say you were looking at the engineer? [73]

A. At the time I was hit, yes, sir, I was facing the engineer.

Q. You were looking right at him?

A. Not right at him; I was facing in that direction.

Q. Were you looking at him or not looking at him?

A. I was looking at him; of course I wouldn't say I had my eyes direct on him, but I was looking at him and the engine.

The Court: It has reached 4:00 o'clock.

Mr. Phelps: I am at a convenient place.

The Court: Ladies and gentlemen, we will recess now until 10:00 o'clock tomorrow morning. During the recess bear in mind the admonition that I have heretofore given you.

(Thereupon an adjournment was taken to Wednesday, tomorrow, November 2, 1949, at 10:00 o'clock a.m.) [74]

(During the trial of the above entitled case, following the testimony of Dr. Leonard Barnard, the following occurred:)

Mr. Digardi: Mr. Bellamy, will you resume the stand?

WILLIAM A. BELLAMY

resumed the stand in his own behalf.

Cross-Examination
(Continued)

By Mr. Phelps:

Q. Mr. Bellamy, before we broke off yesterday evening, I was asking you about what you were doing after you got off this cut of cars and you told me that after you got off, you ran in a diagonal direction into the road facing and watching the engineer, is that correct? A. That is correct.

Q. And you were doing that all that time while you were running out there? A. Yes, sir.

Q. All right. Now, then, so far as the engineer is concerned, this is true, is it not, that the engineer doesn't give you any signals?

A. No, the engineer doesn't give me any signals.

Q. The engineer is only there to receive signals, isn't that correct? A. That's right.

Q. Now, then, when you were backing in—if I may turn this map around so we may see it—when you were backed in on this spur and you picked up some cars in there, can you tell us how far [74A] into the spur you went to pick up those cars?

(Testimony of William A. Bellamy.)

A. Went into the shed, the car was spotted at the shed.

Q. Well, now, that shed runs for some little distance in an easterly direction not shown on the map. What end of the shed, do you remember?

A. That would be on the west end.

Q. The west end of the shed. In the part shown in the diagram?

A. In the part shown in the diagram, that's right.

Q. All right. So that the only distance, then, that you went in was the distance of—would you estimate in car lengths two or three car lengths into that spur?

A. From the end of the spur into the shed, the distance of the car lengths? Is that the question?

Q. Well, I will withdraw it. I want you to do that, I want you to understand my questions. We will put it a different way to you, maybe you can understand it. What I am trying to say to you is, when you went into this spur, Mr. Bellamy, to pick up these cars, about how far into the spur did you go? Can you give us that distance, before you picked up your first car?

Mr. Digardi: How far did what part of the cut go? Maybe that would help him.

Q. (By Mr. Phelps): You had a boxcar, did you? A. Yes, sir.

Q. Ahead of you, of your engine? [74B]

A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Now, how far did the most easterly end of that boxcar go into that spur before you made your joint with the first car that was already in on that spur?

A. The boxcar was stopped just before we got to the car that was spotted at the shed and stood there for some time.

Q. Now, then, whatever this distance works out, that is how far you went in? A. That's right.

Q. All right. Now, which was the baby load, do you remember that?

A. As well as I remember, the baby load was on the west and the chances are an empty on the east end. That is the way I had it in mind.

Q. I see. Now, Mr. Bellamy, so far as——

Mr. Phelps: I won't be using the map any more, gentlemen, if you want to resume your seat. [74C]

* * *

Q. Now with reference to this accident, you were what they call a pin man, as I understand it, is that right? A. Yes, sir.

Q. And also the head brakeman?

A. Yes, sir. It is the same job.

Q. Was there another head brakeman besides you? A. No, sir.

Q. When you went into that spur you had a box car already on your engine, did you, in front of it? A. Yes.

Q. So when you coupled on whatever box car was in there you would couple at the head end of

(Testimony of William A. Bellamy.)

the box car that was on the engine with the box car standing on the spur, is that right? [78]

A. That is right, yes, sir.

Q. And you think you made that couple?

A. Yes, sir, I think I made that couple.

Q. And did anybody help you with it?

A. Well, there is other men around there; I wouldn't be positive whether they passed any signals or give any signals or not; I wouldn't be positive.

Q. Well, after making the couple, did you give a signal?

A. After making the—no, sir, no more than back out. After we had coupled on then we—there was a back up signal given.

Q. Who gave it?

A. I believe Mr. Husson gave that, as well as I remember.

Q. Where were you at the time the back up signal was given?

A. We was near the engine, near the front of the engine.

Q. You personally? A. Yes, sir.

Q. Were you on the ground or were you on the car when that signal was given?

A. I was on the ground.

Q. Did you catch on to the train as it was moving?

A. Just about the time it started moving, yes, sir.

Q. You swung on the end of the box car that

(Testimony of William A. Bellamy.)

was right next to the front of the engine, did you?

A. Yes, sir.

Q. And you rode in that position not looking at the box car [79] itself but looking toward the shed where you had picked up the baby load?

A. Yes, sir, I was in a position where I could turn my head to look in either direction.

Q. Which way were you looking?

A. I had been—well, I had faced each way; I had been looking in each direction coming out.

Q. Now as the train started to back away from the shed where was Mr. Husson?

A. Mr. Husson was there near me, near the front of the engine.

Q. Was he on the ground?

A. Yes, sir, he was on the ground at that time.

Q. Did you see him swing on to the train?

A. I wouldn't be positive whether he caught the train or not.

Q. As a matter of fact, he didn't get on the train at all, did he?

A. I wouldn't say about that, because he wasn't on the train—he didn't catch the train there with me. He might have caught the rear car, but I wouldn't be positive whether he caught the train at all or not.

Q. In your position on the train there were at least box car lengths between you and the end of the train to the east, is that right?

A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. You picked up two box cars; that made three cars? [80]

A. Yes, sir.

Q. You had the length of three box cars between you and the back end of the train?

A. Yes.

Q. Where was Mr. Quinlan?

A. Mr. Quinlan was near the rear car; I wouldn't be positive whether he was on the rear car or the second car, but it was the cut there, as well as I remember.

Q. Was he on the ground or was he on the car?

A. I think he caught the car just after we started backing.

Q. What part of the car was he on when the train started backing from the shed? Was he on the top of the car, or on the side or the end of it, or where?

A. He caught the car. That is about as much as I remember.

Q. And you don't know whether he caught the last one or the next to the last one, is that it?

A. As well as I understand, it was where the second and the last car goes together, one of the steps there. There was only a short distance between the two.

Q. As you understand it. I don't want what you understood. I want what you saw. Did you see that?

A. As well as I remember, yes, sir, as well as I remember.

Q. So that he was in your view, was he?

(Testimony of William A. Bellamy.)

A. He had been in my view, yes, sir.

Q. Well, he was in your view as he was backing out then, isn't [81] that right?

A. Well, yes, sir, I can see Mr. Quinlan.

Q. Or you couldn't see Mr. Husson after the train started backing out, could you?

A. I don't remember seeing Mr. Husson; I wouldn't be positive whether I could see him or not.

Q. And in your position as you were riding the side of the box car, you could see the engineer, could you not?

A. Yes, sir, I could see the engineer.

Q. And you knew, did you not, that the conductor on the train had gone across the highway over here out of the south side of the highway?

A. I didn't know just where the conductor was.

Q. Did you see him when your train started out?

A. Yes, sir, the conductor was over there with the crew when we started out.

Q. What do you mean by "over there"? Do you mean he was down by the shed?

A. We was all standing out there in front of the engine like, along the side of the car.

Q. Down here on the spur?

A. Yes, sir, on the spur.

Q. And your engine was three box cars back here then, is that right, back to the west?

A. The engine was near the shed. The second—there would be [82] the engine and one car west of the shed when we started away.

(Testimony of William A. Bellamy.)

Q. Yes, but between you and the shed there were two box cars you had picked up and one car that was on it, isn't that true?

A. Yes, sir, we picked up the two cars but the car that we had a hold of hadn't gone all the way into the shed.

Q. That is what I understand. So that you were at least one box car to the west of the west edge of that shed before you started to back out?

A. Yes, sir.

Q. A box car is about how long?

A. Approximately 40 feet, I have an idea.

Q. About 40 feet? A. I would say 40 feet.

Q. Isn't it 50 feet?

A. We have different lengths.

Mr. Phelps: They are between 40 and 50 feet. I think they average about 45 feet.

Q. (By Mr. Bledsoe): How much of the box car was into the shed?

A. The box car we had a hold of?

Q. Yes.

A. Just a very short—just the end of it.

Q. How many feet of it, would you say?

A. I wouldn't say over four—two to four feet, if any.

Q. Two to four feet? [83] A. If any.

Q. At that time were there any cars of any description on the main line that were east of the spur or frog or whatever it is they call it, down here where you switch off of the main line? Were

(Testimony of William A. Bellamy.)

there any box cars or any other cars of any type east on the main line?

A. I never noticed any others.

Q. Do you know whether there were or not?

A. I don't think so.

Q. What was in this baby load or the half-filled car?

A. It was more or less of ceiling for building, it looked to me like as——

Q. Asbestos?

A. Well, what you would call——

Mr. Digardi: Composition shingles.

A. The ceiling for a building.

Q. (By Mr. Bledsoe): What shape was it?

A. I never particularly noticed the shape of it.

Q. Like this on this ceiling?

A. Something similar to that, yes, as far as I—— I didn't go in the car. I just saw it from the door there; I could see something of that kind in there.

Q. How was it stacked in there?

A. It looked to be just laid down.

Q. Laid flat. Nothing breakable in it? [84]

A. Nothing breakable, I wouldn't think, no, sir.

Q. Now as you were moving backward here towards the west and riding on the train, do I understand there was no one west of the engine?

A. I don't think so, no, sir.

Q. And there was west of the engine attached to it a caboose? A. Yes, sir.

Q. Anything else? A. A car—box car.

(Testimony of William A. Bellamy.)

Q. A box car and a caboose?

A. As well as I remember.

Q. Now you say that as you were backing up and going in a westerly direction that you were hanging on the side of the box car so that you could turn your head and look in either direction, either to the front or the back of the train, is that right?

A. Yes, sir.

Q. At that time you could see Mr. Quinlan and you could also see the engineer, is that right?

A. Yes, sir.

Q. Did you at any time after your movement started to back up on this spur until the time you got off, see any signal given by any other man in the crew?

A. No, sir, not after we started moving.

Q. The only signal that had been given up to that time, up to [85] the time you got off the train, had been the signal given by Husson to back up?

A. Yes, sir.

Q. That is right. And that was given before you even hooked on to the train?

A. Before I caught the train, yes, sir.

Q. Now you swung off the train while it was moving, did you not?

A. Yes, sir.

Q. And as I understand, your idea is that you got off at this point B-1 that is shown in the diagram, Plaintiff's 6, which would put you between the rails of the mainline track, is that right?

A. I believe that is right, yes, sir.

(Testimony of William A. Bellamy.)

Q. And from that point you broke into a run and ran in a southwesterly direction diagonally out into the highway, isn't that right?

A. Yes, sir.

Q. Were you running at the time the accident happened?

A. I believe I was in a moving position, yes, sir; I was headed for the switch, near the switch there and was just about the stopping point, but I believe I was still in a moving position.

Q. Where were you at the time you were hit, with reference to the engine? Were you opposite any part of the engine?

A. I have an idea I was just ahead of the engine a ways.

Q. By ahead of it, do you mean that you had overtaken the [86] engine and were a lap ahead of it, or were alongside?

A. I was moving approximately the same distance the train was moving, so I wasn't very far from the engine, to what I had been riding on that box car.

Q. About the same place, the front of the engine?

A. Somewhere near there, I have an idea.

Q. And you ran, you think, about 20 steps?

A. 15, 20 steps; it would be hard to judge how many steps I did take.

Q. And your stride is about three feet a stride, is it, running or walking?

A. Hardly that far, I guess. In the neighborhood of three feet, yes, sir. Hardly so far.

(Testimony of William A. Bellamy.)

Q. Now as an army man, you know that a marching step is at about four miles an hour?

A. I don't know exact.

Q. Is that about right?

A. Yes, sir, I have an idea that would be somewhere near right.

Q. And you were going faster than that, weren't you?

A. Not very much faster than that.

Q. But it was a run?

A. It was a running movement; it wasn't a natural walk.

Q. Now during the time that you were running, were you looking right at the engineer?

A. I wouldn't say I was looking direct at him. I had my face [87] in that direction.

Q. And the next thing that you were going to do was to line the switch, isn't that right?

A. Yes, sir.

Q. And that was to be done when the three box cars that were being pulled backward by the engine had cleared the switch points?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. After you lined the switch were you to stand there at the switch where you were making the change of the switch?

A. My duty was to line the switch after the crossover and then bring him back again. It would be a come ahead signal, to put the cars on the main line. That was my duty there.

Q. You were going to stand there at the switch to do that?

(Testimony of William A. Bellamy.)

A. No, sir, I would have crossed over the switch, opposite the switch to do that.

Q. Well, isn't it true that the train was going to move east on the main line after you got backed out clear of the switch?

A. Yes, sir, it was going to move east on the main line.

Q. And it was going to move how far?

A. I would imagine 150 feet to get in the clear; just far enough to clear the spur track, to set those cars out.

Q. Then you were going to uncouple, were you?

A. Yes, sir.

Q. Was it the middle car that you were going to put back on the spur?

A. I haven't noticed the switch lift. I didn't know for sure which car went back in, further than the car ahead of the engine went back in, the only one I know.

Q. Have you ever in working as a switchman given a signal to the fireman?

A. I have, yes, sir.

Q. And the fireman relays the signal to the engineer, isn't that right?

A. He tells him what it is. I don't know if he relays it with his hand, but anyway he tells it.

Q. Either he turns and speaks to him across the cab——

A. Speaks to him, yes, sir.

Q. ——or else he——

A. Yes, sir.

Q. At the time the train was backing out the bell was ringing, was it?

(Testimony of William A. Bellamy.)

A. I wouldn't be positive whether the bell was ringing or not.

Q. When you dropped off the train you were east of the switch that you were going to work on, were you not, the actual switch mechanism that you were going to turn over here?

A. Yes, sir, I was east of the switch.

Q. And according to the diagram, that was about the length of [89] a box car or a little more?

A. Yes, sir, I would——

Q. 60 feet?

A. Approximately the length of a box car.

Q. Now, was it your intention to stop when you got off at the switch and wait for the train to go by and then cross over and change the switch?

A. Yes, sir, that was——

Q. And over here across from the switch is an open space there of a shoulder of the road, is there, on the south side of the highway?

A. Yes, sir, there is an open space on that side of the highway that would be across from the tracks.

Q. Yes. A. Yes, sir.

Q. Something was said about rules of the railroad, what you are required to do as a brakeman. Were you aware of all those rules at the time you were working and the time this accident happened?

A. Yes, sir, I remember the rules very well.

Q. Now, if you don't know where a fellow member of your crew is or where the conductor is,

(Testimony of William A. Bellamy.)

you are not supposed to give any signals for the train to move one way or the other, are you?

A. No, sir, you want to make sure there is nobody underneath the train or around it. Of course, you don't have to see every member of the crew.

Q. And the conductor is usually the one in charge of what is to be done about the movement, is he?

A. Yes, sir, he is charge of the movement of the train.

Q. And you said something yesterday about a switchman who works between the head man and something else. What is that? I didn't quite get what you said.

A. The swing man, he is the man that carries a list of the cars, so he knows the number of cars comes out, the number that goes back in.

Q. What is his position in working on the train when the train is moving in the switching movement, such as this? Is he working between the head man and the engineer?

A. No, sir, he is not working between the head man and the engineer.

Q. Who does he work between?

A. Well, as a rule, he works back of the head man and, well, he has no particular place to work in a movement of that kind.

Q. Who was the swing man on your crew? [91]

A. Mr. Husson.

(Testimony of William A. Bellamy.)

Q. You described yesterday the fact that as you were hanging on the box car and you were facing the crew, that would be Quinlan, I assume, the man you refer to as the crew man?

A. Yes, sir, all three of them were behind me.

Q. And then as you swung off, you switched the direction you were facing so that when you got off the train you turned around and were facing toward Redwood City in the opposite direction that you had been facing, is that right?

A. Yes, sir.

Q. Did you face in the direction of Redwood City, some little time, while the train moved along there? A. No, sir, not very long.

Q. Did you do it long enough to determine where your footing was going to be when you dropped off the boxcar?

A. Well, so far as my footing, I had no special place. It is kind of an automatic move there.

Q. You made it all rather rapidly, did you?

A. Yes, sir, it is more or less of an automatic move. You make it every day and it is hard to say just—

Q. Would you mind coming to the map, Mr. Bellamy, and taking a red crayon?

The Clerk: Here is one, Mr. Bledsoe.

Mr. Bledsoe: Thank you.

Q. And just mark from B-1 and this X here, the course that you [92] took after you stepped into, or between the rails.

(Testimony of William A. Bellamy.)

A. You want me to mark it on this?

Q. Yes. Just draw a line showing the course that you took.

A. This would be the actual highway, this is the way I understand it.

Q. That's right. If you don't understand, let me explain this to you. This is the edge of the pavement, the pavement is 22 feet wide. Then there is a slight shoulder between the pavement and the ties, I guess, that stick out there. And this black line here is the southerly rail of the main line. So that you would cross that black line, which would be the rail, and get over the end of the ties, and then there is a space there before you get on the pavement. And draw it so that it will show the angle at which you went.

A. In coming out of here, I stepped off just approximately somewhere in here. I moved over in this direction this way; my intention was to get to this switch, near the switch, to line the switch after it had crossed over, and bring the car back in this direction. So I gets off here and my position had been at the switch when the train had been stopped to line the switch, and that is about the direction (marking).

Q. All right. And then the end of your placing of that line is where the accident happened?

A. Somewhere near there, yes, sir. I wouldn't—

Q. All right. Well, let that be B-2, as the line

(Testimony of William A. Bellamy.)

that is [93] drawn. Is that clear enough for everyone to see? It is very faint. I had better—That will be B-2, the course that you took. You can sit down again now, Mr. Bellamy.

Now, the area to the west of where you got off the train between that spot and this switch, has the ties in between the rails, does it not, as shown by these pictures? A. Yes, sir.

Q. Plaintiff's No. 17 I think shows it. Is that the way it looked on the day of the accident? Is it a fair representation of it?

A. Yes, sir, that is a fair representation of the track; so far as this truck in here, I don't remember.

Q. Well, without reference to any other movable objects, as far as the terrain was concerned, it looks about the way it did at the time of the accident, does it?

A. Well, so far as the track and highway, yes, sir.

Q. Yes. With reference to the track.

Mr. Bledsoe: I will just pass it along so the jurors may look at it again (handing to nearest juror).

Q. Plaintiff's Exhibit No. 23 shows you standing on the main line rail there, does it not, right opposite the switch?

A. Yes, sir, that shows me standing opposite the switch.

Q. And that switch then is right behind you

(Testimony of William A. Bellamy.)

as you are standing in that picture, and that is the one that you were going to move, is that right?

A. Yes, sir, that is the switch I was supposed to move.

Q. And you are facing right across the highway and this area on the other side of the highway, does that fairly represent the condition that was there at the time of the accident, on the stop side of the highway, which would be in this diagram, this area in here, straight across from the switch?

A. So far as this picture here, I don't see the spur—doesn't show the spur in here very good.

Q. Well, without reference to the spur. All I am asking you about is the condition of the terrain across the highway opposite where you are standing. You are facing right across on the other side. You are standing here, are you not?

A. Yes, sir.

Q. In that picture, looking in this direction. Now does the picture fairly show the condition of the terrain over there as it was at the time of the accident?

A. As far as I recall, that is—there is that building over there, this is the highway and kind of a space in there (indicating).

Q. Yes, off the pavement? A. Yes, sir.

Q. There is a shoulder there. I think this Plaintiff's Exhibit 20 shows the shoulder better, does it not?

A. Yes, sir, that shows it better.

(Testimony of William A. Bellamy.)

Q. That is about the way it was at the time of the accident? [95]

A. Well, I wouldn't remember just what it was over in here, but I know it is a space over there between this house and—there is kind of a space. So far as—

Q. Over here, this is what I am talking about. In there.

A. In there, yes, sir. I don't know just what is there, but it is a space. I know it is a space between this and the house over there.

Q. Yes.

Mr. Bledsoe: I will pass this to the jury also.

Q. Plaintiff's Exhibit 7, which is the diagram drawn by the Southern Pacific—am I pointing correctly to the place where the switch is?

A. That is the shed to the right there, isn't it?

Q. The shed here, yes, sir.

A. Yes, that would be the switch there.

Q. I will mark that. I will put an S there showing the switch.

This curve of the road west of the switch is the sharper curve, is it not? It sharpens up after it goes west?

A. It kind of straightens out after it goes.

Q. This Plaintiff's Exhibit 15; does that show it correctly, about how it curves?

A. Yes, sir, that shows about the curve of the road.

Q. Now, at the time this accident happened, of

(Testimony of William A. Bellamy.)

course, you had a train sitting on there in that area where the red X is located, did you not? [96]

A. At the time of the accident, we had some cars right in there.

Q. Covering over that area where the red X is in the photograph?

A. Our train was about the middle of this switch here. We had some cars on each side of it.

Q. So that the train was cutting off the view in that picture if you were standing where the cameraman was with the train on there—the camera wouldn't be able to see around to the west of where that individual was standing in the roadway, would he?

A. Not very far.

Mr. Bledsoe: I think that is all. Thank you. I had better pass this to the jury so they will know what we were talking about.

That is all, Your Honor.

Mr. Hepperle: May we have just a moment, Your Honor?

The Court: We will take a recess as soon as the jury has finished looking at these photographs.

(Photographs examined by jury.)

The Court: We will recess now, ladies and gentlemen, until 2:00 o'clock this afternoon. Please bear in mind the admonition I have heretofore given you.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [97]

(Testimony of William A. Bellamy.)

Afternoon Session

Wednesday, November 2, 1949, 2:00 o'Clock

Mr. Digardi: Mr. Bellamy, you may take the stand again.

(Whereupon the plaintiff resumed the stand.)

Redirect Examination

By Mr. Digardi:

Q. Mr. Bellamy, was this accident, did it take place at 5:35 a.m. or p.m.? A. 5:35 p.m.

Q. Was it daylight or dark?

A. It was daylight.

Q. What was the condition of visibility?

A. I would say good.

Q. Well, Mr. Bellamy, did you observe the condition of the footing on the other side or on the north side of the track?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial in this case. The question is, what was the footing here where he got off. It certainly hasn't anything to do with this case.

Mr. Digardi: It has this to do, Your Honor.

The Court: Would you read that last question and answer, or the question for me?

(Previous question read.)

The Court: I think I will allow it.

Q. (By Mr. Digardi): Will you answer the question? A. Yes, sir. [98]

Q. What was the condition of that footing?

A. Irregular ground—rubbish and different

(Testimony of William A. Bellamy.)

kinds of things over there. Holes and rubbish, irregular ground.

Q. Mr. Bellamy, you were asked, or you stated on your examination, that you had got off to pass signals from the engineer, or rather, to the engineer from other men. What particular signals would have been required to be passed?

Mr. Phelps: Objected to as leading and suggestive. I don't believe that that is the testimony, and I object to that portion of the question which includes the statement of what he has previously testified to.

Mr. Bledsoe: We join in that objection.

The Court: Well, I think that is more or less correct. I will allow you to ask him the question whether or not he was required to do anything else besides wait for the train to pass and then cross over and throw the switch.

Q. (By Mr. Digardi): Mr. Bellamy, were you required to do anything else other than drop off, wait for the train to pass and cross over and line the switch?

A. I was required to look out for signals in case some should be passed from the rear end.

Q. Whose duty was it to pass signals to the engineer to stop the train after it had cleared the switch? A. It was my duty.

Mr. Phelps: I will object to that as incompetent, irrelevant [99] and immaterial as to whose duty it was afterwards, if Your Honor please.

(Testimony of William A. Bellamy.)

The Court: Well, that has already been answered. He said it was "my duty."

Mr. Phelps: May my objection be noted before the answer?

The Court: Proceed.

Q. (By Mr. Digardi): Mr. Phelps asked you if you heard at any time the automobile as it went by you, or rather, the pickup truck as it went by you. Now, Mr. Bellamy, calling your attention to the movement of cars and locomotive on this track, does that make a noise or otherwise?

A. Yes, sir, it makes a noise.

Q. Is that noise considerable or otherwise?

A. I would say considerable.

Q. Mr. Bellamy, as you were riding on the side ladder of the car pulling out of the spur, did Mr. Quinlan remain in your view at all times?

A. Mr. Quinlan had just passed out of my view.

Q. Had just passed out of your view at what point? A. Just before I left the car.

Mr. Digardi: Mr. Clerk, will you mark these pictures Plaintiff's exhibits next in order? I might state that both counsel have seen these pictures.

Mr. Phelps: Once again, so that we may know which ones you were referring to before you show it to the witness, may we [100] see it? Otherwise it is unintelligible to us, what you are questioning him about.

Mr. Digardi: These are Exhibits 31 through—
The Clerk: 37 for identification.

(Testimony of William A. Bellamy.)

(Thereupon photographs referred to were marked Plaintiff's Exhibits No. 31 to 37, inclusive, for identification.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 32 for identification, and will you tell us briefly what that shows?

A. This shows a locomotive with a boxcar ahead of it.

Q. Could you indicate on that picture where, if any place, you were located on the boxcar as you were riding out of the spur? A. Yes, sir.

Mr. Phelps: Mr. Digardi, which one was that? Was that the one I told you I would have some objection to?

Mr. Digardi: No, I set that one aside.

Q. Would you so indicate?

A. I was riding at that point there (indicating).

Mr. Digardi: I will put an X on the ladder where the witness states he was riding. We offer in evidence Plaintiff's Exhibit 32.

Mr. Phelps: No objection.

The Court: 32 in evidence.

(Thereupon Plaintiff's Exhibit No. 32 was received in evidence.)

Q. (By Mr. Digardi): I now show you Plaintiff's 33 and ask you [101] what that shows.

A. This shows——

The Court: Better start passing those to the jury so they will have in mind the testimony given.

(Testimony of William A. Bellamy.)

A. This shows a locomotive with three boxcars ahead of it.

(Photographs handed to nearest juror by counsel.)

Q. (By Mr. Digardi): Could you indicate on that diagram where you were riding?

A. I was riding at this point.

Mr. Digardi: I will mark an X where the witness states he was riding. We offer in evidence Plaintiff's Exhibit No. 33.

(Whereupon Plaintiff's Exhibit No. 33 was received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 34 and will you state what that shows.

A. This shows just an ordinary boxcar.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit 34.

(Thereupon Plaintiff's Exhibit No. 34 for identification was received in evidence.)

(Conversation between Messrs. Digardi and Phelps out of hearing of Reporter.)

Mr. Phelps: Those are the ones you just referred to?

Mr. Digardi: No, these are the next.

Mr. Bledsoe: You are going to offer these?

Mr. Digardi: I am going to offer these three also, just to illustrate a locomotive and a tender.

Mr. Bledsoe: All right, I have no objection.

(Testimony of William A. Bellamy.)

Mr. Phelps: Well, I have no objection, and I might state, so the jury will know, and for your assistance, Mr. Digardi, that those pictures, by the way, are through my courtesy. I took them, or had them taken. But the point is, I wanted to tell you, so you could bring it out if you wish, that that is the exact engine involved in the accident. And the boxcars, so far as I know, are all standard and it is probably very substantially similar. So if that will help you——

Mr. Digardi: Thank you, Mr. Phelps. We will offer in evidence Plaintiff's Exhibit 35 and 36, which, as counsel indicated, show the exact engine that was involved in this accident.

Mr. Phelps: I might state, though, not taken immediately after the accident, but taken last week. I don't know of my own knowledge of any changes, but I think probably it is the same.

(Thereupon Plaintiff's Exhibits No. 35 and 36 were received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 37 for identification and ask you what that shows.

A. This shows a string of cars; that looks like a locomotive there, as well as I can see.

Q. Can you see on that the main line of track?

A. Yes, sir.

Q. And on what track are the boxcars located?

A. The box cars would be on the spur track.

(Testimony of William A. Bellamy.)

Mr. Digardi: We offer in evidence Plaintiff's Exhibit 37.

(Thereupon Plaintiff's Exhibit No. 37 for identification was received in evidence.)

Mr. Digardi: And Mr. Phelps has an objection to 31; if he would state his objection now?

Mr. Phelps: Certainly. If Your Honor please, the picture that counsel now is showing me is marked 31 for identification for the plaintiff. My objection is that I presume counsel intends to prove from this witness the view at that point. The camera obviously was placed from a point, as I think I can very easily establish, and you probably stipulate, where Mr. Bellamy on his story never reached. It shows the engineer's view, if Your Honor please.

Mr. Digardi: Well, we will withdraw this and put that in through the engineer, then.

The Court: All right.

Mr. Phelps: Very well.

Mr. Digardi: Any objection to these, Mr. Phelps?

Mr. Phelps: No.

Mr. Digardi: Mr. Clerk, will you mark this Plaintiff's Exhibit next in order? This is a photograph of a boxcar, an end view, merely to show the overhang of a boxcar over the edge of the rails. It is merely for illustration. This particular car has nothing to do with the accident. [104]

The Clerk: Plaintiff's Exhibit 38 in evidence.

(Testimony of William A. Bellamy.)

Mr. Digardi: We offer Plaintiff's Exhibit 38 for identification in evidence.

(Thereupon photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 38.)

Mr. Phelps: While you are on the same subject, I have got the exact measurements of the standard boxcar, if you want them.

Mr. Digardi: The picture will serve the purpose, unless you want to put that in.

Mr. Phelps: I thought we could stipulate to the exact measurements. You asked your witness earlier and I, over the noon hour, have secured the measurements of the standard boxcar, if you want them. You could have them right now while you are talking about the overhang.

Mr. Digardi: Well, we would have to check that ourselves, and if you could submit it to me, we could put that in at some other time.

Mr. Phelps: All right. [105]

* * *

Recross-Examination

By Mr. Phelps:

Q. Now, Mr. Bellamy, Mr. Bledsoe asked you whether you knew where your conductor was at the time you dropped off this car, and I believe you said that you weren't sure, is that right?

A. Yes, sir, I wasn't sure.

Q. Now, as a matter of fact, don't you know, thinking back,—and wouldn't this refresh your recollection—that your conductor was stationed across

(Testimony of William A. Bellamy.)

the highway on the south side [107] of the highway, across the highway? Don't you know that?

A. I did not see him.

Q. Didn't you see him out there?

A. I did not see him there.

Q. Well, now, Mr. Bellamy, isn't it your duty to know where the other members of your crew are? A. Not away from the train.

Q. Not away from the train? Didn't you see him go over there? A. No, sir, I did not.

Q. You didn't see him go over there. So, as a matter of fact, when you were looking in this direction, then, you weren't in a position to pass any signals, then, even to the conductor, is that right?

A. The conductor wasn't on the train. I was taking signals from the men that were working on the train.

Q. That is what I am getting at. The conductor wasn't on the train.

A. I didn't see the conductor.

Q. All right. So you knew he wasn't on the train? A. If I did, it was after.

Q. And you knew he wasn't riding the point? In other words, you knew there were no members of your crew, as you have already testified before, on the other side or the west side of the engine?

A. No, sir. [108]

Q. All right. So you knew that your conductor was somewhere on the ground, and your testimony is, being a railroad man, that you didn't look

(Testimony of William A. Bellamy.)

around to see where the other man was, is that right?

A. I was watching the men on the train. I wasn't watching the men away from the train.

Q. You weren't—the fact is that you couldn't account for the conductor who had been right there—it didn't interest you at all?

A. Oh, I saw the conductor before he started away, but the exact point I couldn't say where he was.

Q. And did you see him cross the road and go over to that position or not?

A. I didn't see him cross the road.

Q. All right. Now, then, you say that, on re-direct from your counsel, Mr. Quinlan passed out of your view. Now, who is Mr. Quinlan? We haven't heard him identified yet.

A. He is a brakeman.

Q. Was he your rear man?

A. He was the rear man.

Q. All right. When he passed out of your view, of course you were looking at him, weren't you?

A. Yes, sir, I had been looking at him.

Q. Now, when he passed out of view and when you were looking at him, can you tell us where he was? [109]

A. He was on the rear car, as well as I remember, where the second and third cars come together. That is as well as I remember.

Q. And do you know whether he was high or low?

(Testimony of William A. Bellamy.)

A. I couldn't say at the exact time.

Q. Well, Mr. Bellamy, you just give us your best memory, because you were there and you made an observation. Now, you would have known whether a man was riding low on a low ladder or whether he was riding high on a high ladder, wouldn't you?

A. The last view I had of Mr. Quinlan, he was on the ladder.

Q. How high up?

A. That would be hard for me to say.

Q. Well, about how high? About halfway up?

A. As well as I remember, he was about the second step.

Q. About the second step?

A. I wouldn't be positive, but it was around there.

Q. All right. Now, Mr. Bellamy, if he was the second step up, then he had to be on the rear end of that rear car, didn't he? Because on the front end of that rear end you have what you railroad men know as the "short ladder," don't you?

A. There are two ladders here together.

Q. That's right.

A. There is where—one of those ladders. I wouldn't be positive which.

Q. Well, was he on the high ladder or the short ladder of the [110] rear car?

A. I couldn't be positive.

Q. All right. But it is a fact, is it not, that every railroad car that you have ever seen, standard

(Testimony of William A. Bellamy.)

construction, has the high ladder on the rear end in the direction of that movement?

A. In the direction of that movement, it would be the rear end.

Q. Now, as the train and engine were coming out and just before you dropped off, the movement was perfectly easy, wasn't it? A. Yes, sir.

Q. It was going perfectly smoothly and slowly?

A. Yes, sir.

Q. It was perfectly easy, to use a railroad phrase, isn't that right? A. Yes, sir.

Mr. Digardi: If your Honor please, we have already gone into this and we have no claim that the man was injured by the movement of the cars or in getting off the train.

Mr. Phelps: That is not the purpose of my question. That was preliminary to the next one, if your Honor please.

The Court: I think it has been repeated a number of times.

Mr. Phelps: If I may be permitted, I show you I have a purpose. [111]

The Court: All right, proceed.

Mr. Phelps: May I have that question and answer read?

(Previous question and answer read.)

Q. (By Mr. Phelps): All right. So at the time you got off that cut of cars, then, there was no occasion for you to give any easy sign, was there?

A. No, sir, no occasion for me giving the easy sign at that time.

(Testimony of William A. Bellamy.)

Q. No, sir. And the sign in railroad signals, with your arms out like this (indicating), is an easy sign, isn't it?

A. Yes, sir, that is an easy sign.

Mr. Phelps: Indicating for the record my hands parallel and outstretched. That is all.

Recross Examination

By Mr. Bledsoe:

Q. Mr. Bellamy, you stated that you were required to look out for signals from the rear and pass them to the engineer; is that what you stated?

A. Yes, sir.

Q. And by the "rear" you mean down toward the shed, is that it? A. That is it.

Q. Down in that direction (indicating)?

A. Yes, sir.

Q. And I understood you to say this morning that up to the time you stepped off the train, you had received no signals from the rear? [112]

A. No, sir, I had received no signals from the rear.

Q. And you say that Mr. Quinlan passed out of your view just before you left the car. He passed out of your view because you quit looking at him, didn't he, when you turned around?

A. Going around the curve.

Q. Well, wasn't it because you turned around that you didn't see him any more?

A. That is deep curve as we was going around

(Testimony of William A. Bellamy.)

the curve, and he was kind of going out of my view on account of the boxcars there.

Q. Now, that was when you were still in the boxcar?

A. Yes, sir; that is the reason I left the boxcar.

Q. All right. And after you got off the boxcar, you didn't look back to see whether he was in your view when you stood at B-1, did you?

A. I looked in that direction when I left the car.

Q. After you hit the ground, from that time on you were looking toward the engineer, were you not?

A. I was looking toward the engineer.

Q. That's right. And after you hit the ground, you didn't turn around and look to see whether Quinlan was in your view from B-1, did you?

A. No, sir, I was trying to get in view of Mr. Quinlan. That's the reason I left the car to get on the ground.

Mr. Bledsoe: We move to strike what he was trying to do, [113] on the ground it is not responsive to the question.

The Court: I will let that go out. He has already stated it in response to another question.

Q. (By Mr. Bledsoe): Now, I understood you to say that you were not looking for the conductor but were looking for the man at the rear, is that right?

A. Yes, sir, I was looking for the man on the cars.

(Testimony of William A. Bellamy.)

Q. And you were not extending your gaze away from the train, then; you were keeping it on the trainman, is that right?

A. I was keeping it on the trainman and on the highway.

Q. Well, if you were keeping it on the highway, how far on the highway did you keep it?

A. Well, I could keep it just as far as I could see, because after you head in that direction you can easily see a man on the car and the highway, just as far back as you can see, as the curve will permit.

Q. Well, was there anything south of the spur track that would prevent you from seeing all the way across the highway and even down to the south here, a considerable distance south of the highway?

A. The curve and the boxcars would prevent me from seeing very far back.

Q. You mean these boxcars on the spur track?

A. Yes, sir, you can't see very far. There is boxcars on that curve. [114]

Q. You mean they would prevent you from looking across over here in this direction I am pointing—that would take your gaze south?

A. Not across the highway.

Q. That wouldn't be preventing you, would it?

A. Well, for some distance back there, but after you got a distance back there, you can't see anything at all.

Q. Well, let's just confine ourselves to the area

(Testimony of William A. Bellamy.)

across from the shed. Take this area down here that I am marking off south of the highway, south from the shed and then westerly. There was nothing in that territory that prevented your view from going at least as far as the shed and across the highway south, to the south side of it, was there?

A. I couldn't see the shed from where I was.

Q. I am not talking about the shed, Mr. Bellamy, I am talking about——

A. I couldn't see that far back either. About there (indicating) was as far back as I could see.

Q. Could you see the main line track as far as the shed? A. No, sir, I couldn't.

Q. You could not? A. No, sir.

Q. From B-1 you could not see the main line track as far as there? A. No, sir. [115]

Q. Could you see the highway as far as the shed at the point you got off?

A. I don't believe I could. Not all the way. No, I couldn't. Chances are I seen the edge of it, the outer edge, but I couldn't see the inside curve of it.

Q. You could see the south edge of it, and opposite the shed. I am pointing to the south edge. The point where you were on the boxcar, at B-1, you could see that, is that right?

A. No, sir, I couldn't see the highway across there, definitely.

Q. You could not. All right. Well, suppose you come down here, Mr. Bellamy, and mark on the diagram at what point you could see down there

(Testimony of William A. Bellamy.)

on the highway and could see all the way across the highway.

A. I believe that would be pretty well— (marking).

Q. All right. Now, you have drawn a line—

A. To the best of my judgment, it would be there.

Q. Now, we will draw a red line across. We will mark that B-3. All right. Now, you can resume your seat, Mr. Bellamy.

You could see the whole highway as far as B-3, could you?

A. I don't believe I could see the inside curve that far.

Q. Could you see the middle of the highway as far as B-3?

A. Well, the best of my judgment, on the map, I could see the middle of the highway, yes, sir.

Q. Now, do I understand you to say that you did not look across the highway into the area south of it at any part of this [116] territory between B-1 and B-3?

A. I didn't make no special purpose to look across that way.

Q. And your primary gaze or primary purpose in looking was to look at Quinlan, isn't that it?

A. Yes, sir, Quinlan. That was the man I was looking for.

Q. Were you expecting Quinlan to give you a signal?

(Testimony of William A. Bellamy.)

A. I wasn't expecting him to, but I never knew.

Q. Have you any idea at all as to what kind of a signal you might be getting from Quinlan on that kind of a move?

A. Well, that kind of a move, you never know. Something might happen on the rear end, some man can fall or something like that. He could give me a signal.

Q. Now, when you got off and ran 15 or 20 steps, it was your purpose to get down opposite where the switch was, is that right?

A. Yes, sir, that would give me a better view of around the curve.

Q. And it is correct that what you told Mr. Phelps the other day, that during the time that you were looking toward the engineer—that's right, isn't it?

A. After I started in my running movement, I was facing the engineer, yes, sir.

Mr. Bledsoe: Yes. I think that's all.

Mr. Digardi: No further questions. You may step down, Mr. Bellamy. [117]

Mr. Phelps: Just one second. I don't think I have any, but I was looking at some of the pictures. Where are the last ones you put in?

Mr. Digardi: I think the juror still has them.

Mr. Phelps: Oh, I see. That is why I couldn't find them. May I have just one moment, Your Honor?

(Testimony of William A. Bellamy.)

Recross-Examination

Q. (By Mr. Phelps: I do have one or two other questions about this picture, No. 37. I want to show you what has just been introduced as Plaintiff's Exhibit No. 37. Now, I call your attention in that picture to the location of the leading car—that is the car farthest away in this picture, or the boxcar next to the engine. Can you see where that is? A. Yes, sir, I see where that is.

Q. And just over a little road crossing, isn't it?

A. Yes, sir, there is a little road crossing.

Q. And that road crossing that is over there would be this little road crossing which is shown here, is that right?

A. That is about right, yes.

Q. All right. Let's mark that, then, if I may on this photograph so that we can identify it. I will draw an arrow down to that crossing and we will mark that on this photograph, 37, "B-1."

Have I correctly marked that as the little road crossing which is very near the frog of the switch?

A. This one, this road crossing, would be to the east of the switch.

Q. Just east of the switch?

A. East of the frog.

Q. East of the frog. And the frog of the switch is what point on the switch?

A. That is where you have your pencil. That would be the frog.

Q. Where the two inner rails cross?

A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Let's just mark that. I will put "frog." We have been using so many railroad terms.

All right. Now, then, Mr. Bellamy, if you will notice that picture you will see that it was taken with some cars on the spur. Do you not see the cars on the spur there?

A. It shows to be on the spur, yes, sir, if that is it.

Q. That is the track, of course, that you were on?

A. Yes.

Q. And there were three cars there. And then here is another little driveway here. Can you see that?

A. Is that the driveway you have been speaking about now?

Q. No, that is another driveway that I am pointing to. What driveway is that?

A. I only remember the one driveway in there.

Q. Only remember one. Well, perhaps we can refresh your recollection from some of the photographs you have identified. [119] I am handing you now Plaintiff's Exhibit No. 16. You will notice there are two driveways across here, one right over where your counsel has marked the letter M and another one further down by the frog. Does that refresh your recollection that there is, then, another crossing east of the switch?

A. Yes, sir, it shows two driveways in there.

Q. All right. Now, having refreshed your recollection and referring again to Plaintiff's Exhibit 37, can we identify the crossing shown on there as that

(Testimony of William A. Bellamy.)

crossing I have just indicated and that you have identified?

A. This would be the first one, that would be the second one, right here.

Q. All right. I will mark an arrow down to there, indicating the second crossing. Now, then, Mr. Bellamy, how far is it from those two crossings, to your best recollection? Do you know?

A. No, sir, I don't know, because I don't remember this one. I haven't a very good idea of the second crossing.

Q. Now, the second crossing is very, very close, is it not, to the shed itself? Isn't it?

A. I don't remember that second crossing very well, no, sir.

Q. Well, I will show you another picture. I will show you Plaintiff's Exhibit 18. Can you identify the second crossing in that picture?

A. Yes, sir, that shows a second crossing there.

Q. That does show the second crossing. And will you note, please, the location of that second crossing as right adjacent to the most westerly end of that shed—comes right into it?

A. It sure is on the picture.

Q. All right. Now, then, having that in mind, and noticing that this picture is taken, the boxcar positions where I have indicated, just over the first crossing, indicating that you can clearly see the second crossing; is it still your testimony, after looking at that picture, that your view from the point in here, either B-1 or back in by the frog,

(Testimony of William A. Bellamy.)

either way you want to put it, that you can not see down onto the highway to the point opposite that driveway, which is shown in that picture?

A. Yes, sir, you can see that.

Q. You can see it. You believe, then, that that photograph isn't speaking the truth, is that right, when it shows that view and shows both——

Mr. Hepperle: Objected to as argumentative, Your Honor.

The Court: Yes, I think that is argumentative. Sustain the objection.

Mr. Phelps: Yes, Your Honor.

Q. Well, at any rate, you do not change your testimony—this will not refresh your recollection?

A. I do not change my testimony, but a larger picture will show that more plainly than a smaller one.

Q. Well, may I ask you if this photograph was not taken, or [121] does not show the same type of boxcars as you had hold of?

A. It shows the same type of boxcar.

Q. Does it not show the boxcars in the same spur that you were riding out of at the time?

A. Yes, sir.

Q. And does it not show them in the approximate position you were at the time you dropped off?

A. Approximately, yes, sir.

Q. All right. So that you have identified this photograph yourself, have you not, Mr. Bellamy, on questions from your own counsel, as showing the view from that point? You have, have you not?

(Testimony of William A. Bellamy.)

A. Yes, sir.

Mr. Phelps: All right, no other questions.

Mr. Bledsoe: No further questions, Your Honor.

Mr. Hepperle: You may step down, Mr. Bellamy.

Morning Session, Wednesday, November 2, 1949,
at 10:00 a.m.

The Clerk: Case of Bellamy vs. Southern Pacific
Company and others, for trial.

Mr. Hepperle: Ready for the plaintiff.

Mr. Bledsoe: Ready.

Mr. Phelps: Ready.

Mr. Hepperle: With the court's permission,
your Honor, we would like to call Dr. Leonard Bar-
nard out of order.

The Court: All right.

Mr. Phelps: No objection.

LEONARD BARNARD

called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name?

A. Leonard Barnard.

Direct Examination

By Mr. Digardi:

Q. Where do you live, Doctor?

A. I live at 55 Sharon Avenue in Piedmont,
California.

Q. What is your business or profession?

A. I am a licensed physician, confining my prac-
tice to bone and joint surgery.

(Testimony of Leonard Barnard.)

Q. Are you duly licensed to practice your profession in the State of California? A. I am.

Q. And where do you maintain your offices?

A. At 2939 Summit Street, in Oakland.

Q. Doctor, will you give us somewhat of a background of your education and training?

Mr. Phelps: We will stipulate to the doctor's qualifications as an orthopedic surgeon.

Mr. Digardi: I think it might be well for the jury to hear the doctor's qualifications; there might be some problems in the minds of the jurors as to the medical evidence.

The Court: All right, I will permit you to proceed this way.

Q. (By Mr. Digardi): Will you answer the question, Doctor?

A. I graduated from Stanford University Medical School in 1927, was an assistant to Dr. N. Austin Carey from 1927 to 1929, and from '30 to 1935. In 1929 to 1930 I was a graduate student at the University of Iowa. I confined my practice to orthopedic surgery since 1930, and I am licensed by the American Board of Orthopedists as a specialist in orthopedic surgery and am a member of the Academy of Orthopedic Surgeons. I was formerly an instructor in orthopedic surgery at Stanford University Medical School. I am on the staff of the Providence, Alta Bates, Herrick, East Oakland, Alameda, Peralta Hospitals, and chief orthopedic surgeon at the Alameda County Institutions,

(Testimony of Leonard Barnard.)

and the Island, Fairmont and Del Valle Hospital, consultant in orthopedic surgery to the United States Veterans' [76] Administration, and to the Secretary of the United States.

Q. Doctor, will you tell the jury what orthopedic surgery consists of? What is that field of practice?

A. Orthopedic surgery primarily is the field of surgery concerned with bones and joints.

Q. Now, Doctor, have you examined at any time Mr. William Bellamy on behalf of the plaintiff?

A. I have examined him on two occasions, in July and again eight months ago.

Q. Calling your attention, Doctor, to the examination you made in July, what complaint did Mr. Bellamy make to you at that time?

Mr. Phelps: Objected to, if your Honor please—his complaints; unless it is understood that they are for the purpose of what the plaintiff told the doctor. Otherwise, it would be self-serving. But only for the purpose of his basing his opinion.

Mr. Digardi: That is the purpose, your Honor.

The Court: I will overrule the objection.

Mr. Phelps: Assuming he is basing a hypothetical question on that, we would have no objection.

The Court: I will overrule the objection.

Mr. Phelps: May it be understood that they are limited to that purpose, though, your Honor?

The Court: Yes. [77]

A. Mr. Bellamy stated to me that on July 27, 1949, he had pain in the left ribs and left shoulder

(Testimony of Leonard Barnard.)

and that it hurt him to cough and sneeze. He stated that he had no good use of his left shoulder and that there was pain behind the left shoulder and soreness in his left upper arm.

Q. (By Mr. Digardi): Did he give you a further history of the treatment that had been given him? A. Yes, sir.

Q. Would you state that, please?

A. He stated that he was injured on April 4, 1949, while at his work; he was struck by an auto and knocked to the street. He stated that he was out or unconscious for a short period and that he bled severely from a large cut on his left arm and that he had immediate pain in the left shoulder and chest as well. He stated that he was taken to the Southern Pacific Hospital in San Francisco, where he was given an anaesthetic and the arm wound was sewed up and a cast was applied about his shoulder, on account of a fracture of his left collarbone. He stated that this remained on for about two months and that he had not been able to work since the accident; that he had received some physical therapy to help build up the muscle power in his shoulder, but at the time of my examination or observation he was receiving no active treatment.

Q. Did you make a physical examination of Mr. Bellamy? A. Yes, sir, I did. [78]

Q. And what were your findings on that examination?

(Testimony of Leonard Barnard.)

A. My physical examination revealed a medium height man five feet nine inches in height, who stood erect, thinly built, weighing 155 pounds. His general appearance is normal and his intelligence was average, answering questions clearly. His head showed a normal size and shape, thin growth of hair, but no evidence of injury or abnormality was noted. Face was normal, teeth were natural with much dental work. Throat: the tonsils were missing. His eyes: . . . pupil reacted normally. Ears: gross hearing was intact. His chest was symmetrical, except for some flattening in the lower left ribs at the level of the nipple line. Expansion, however, was good, and the lungs and heart sounds were clear. His blood pressure was 122/72. The ribs on palpation showed a definite thickening on the left at the level of the sixth and seventh ribs in the auxiliary or armpit line. His abdomen was flat, with good muscles, no masses or areas of tenderness, and there was a relaxed right hernial ring. His back; the patient stood in good balance and posture and exhibited a full range of motion in all directions, with the complaint of pain at the level of the second and third thoracic vertebrae, dorsally on the left side near the shoulder blade; but without any true muscle spasm. His leg signs were free and the pelvic, sacrum and coccyx appeared normal to me. In the upper extremities, in the neck, there were moderate complaints of tenderness on [79] palpation at the base, referable into the left shoulder region.

(Testimony of Leonard Barnard.)

In the shoulder joint, the right showed a full range of motion. In the left, the motions were restricted. Abduction, or moving the arm down from the side, was restricted at 110 degrees over 165 in his opposite good shoulder.

Q. Doctor, what do you mean by 110 over 165?

A. In judging range of motion about joints, we set them up as part of angles. When the arm is at the side, we would say it is at zero. When it is half way up, it is 90 degree angle; when all the way up, it would be 180 degrees angle. So the range would be in this man, 110, which would be 20 degrees up beyond a right angle, while the opposite side was 165, 15 degrees short of a straight line. Forward elevation, or moving the arms up forward from the side, was found to be restricted at 150, or 180 on the opposite side. In other words, *there* were 30 degrees loss of forward elevation. About the shoulder joint there was muscle atrophy noted in the deltoid or the bulging muscle (indicating).

Q. Doctor, will you describe what muscle atrophy is?

A. By "atrophy," we mean a shrinkage of a muscle. It loses its body and tone and is softer than a normal muscle.

Q. Will you continue?

A. The rotation motions: the inward and outward motions of the shoulder were normal. The clavicles or collarbones showed an irregularity on either side in the middle third of the [80] collar-

(Testimony of Leonard Barnard.)

bone, with tenderness on the left. The arms, on the left arm there was general diffuse atrophy of the musculature through the arm, in the lower third of the left arm, near the elbow there was a jagged, irregular laceration, healed, a scar on it, which started posteriorally and ran laterally and backwards a distance of five inches. The scar was quite deep and was bound down in part to the triceps muscle and into the muscle, the brachioradialis, which is an arm muscle, runs from the arm to the forearm at the elbow joint on the outer side. There was mild tenderness to percussion; that is, touching over the scar (indicating). The wrist joint in the right, there was an old deformity of a healed Colles fracture, but with a full range of motion. And the left was normal. In the hands, the grip as judged by a spring machine was, on the right, 240, as compared to 200 on the left. The patient stated to me that he was normally righthanded. The finer movements were normal. In the lower extremities, there is generally normal and equal and free movement, except for some evidence of old injury involving the right knee, with some crepitation and thickening and moderate limitation of flexion on bending. The examination of his nervous system was normal.

Q. Did you have X-rays at your office, Doctor?

A. Yes, sir, I did.

Q. Did you personally supervise the taking of those X-rays? [81]

A. I did, sir.

Q. And what did you find on X-ray examination of Mr. Bellamy?

(Testimony of Leonard Barnard.)

A. I took an anterior-posterior front-to-back view of his left shoulder, which revealed a healing fracture of the clavicle or collarbone in the mid third, with comminution. That is multiple fragments. And with some overlapping and shortening, estimated at three fourths of an inch. I took views of his left chest, and these disclosed fractures of the sixth, seventh and eighth ribs in the axillary line; the position of the sixth and seventh was generally good, but that of seventh—I mean the sixth and the eighth was good, but that of the seventh was healed with some overlapping. I took a lateral view of his cervical dorsal spine; that is the base of the neck and upper part of the chest. This disclosed some arthritic changes, some roughening and spur formation, but no fractures were found.

Q. Doctor, from the history given you by the plaintiff and from your examination of him and the X-rays that you took, did you make a diagnosis?

A. I did.

Q. Will you state that, please?

A. I came to the conclusion that this man had, first, suffered a comminuted fracture of his left collarbone; that he had been fractured at the sixth, seventh and eighth ribs in the left [82] chest; that he had suffered a severe laceration with some tissue loss from the left lower arm.

Q. Doctor, did you have an opinion at that time as to what his condition was as a result of this accident?

(Testimony of Leonard Barnard.)

A. Yes, sir, I did.

Q. Will you state that, please?

A. I felt at this time, in July—July 27, 1949—that the man still showed persistent weakness in his left arm, which I believe would be justified from the severity and multiplicity of his injury. I felt that the laceration of his arm was of such depth that it involved the muscle structures at the site, and therefore had produced some deep scarring with resulting weakness, which will in part be permanent. The fracture of the clavicle, I felt, would be clinically—in other words, to palpation or observation—healed, with some shortening and overlapping. Residually in the shoulder, as a result of the trauma and immobilization necessary for his treatment, there persisted a mild restriction of motion. This, however, I felt would clear. With reference to the complaints in his upper back and neck, I felt they were justifiable on the basis of his shoulder fracture and secondary strain to the muscle structures. By that I mean the mechanism of trauma, being struck hard enough on the shoulder to fracture the collarbone and the ribs. The back, I felt, must have sustained some injury as well. [83]

Q. Doctor, did you have an opinion at that time as to whether or not Mr. Bellamy was able to return to his duties as a railroad brakeman?

A. I felt at that time that this man was not ready to return to his duties as a railroad brakeman. I did not believe that he had sufficient power or use of his left arm to do this occupation safely.

(Testimony of Leonard Barnard.)

Q. Doctor, did you make a physical examination of Mr. Bellamy? A. I did, sir.

Q. At what time?

A. On October 25, 1949.

Q. What did you find his condition to be at that time?

A. At this time the man was still complaining of weakness and limited motion in his left arm and shoulder. I found that his range of motion in the shoulder joint had improved, but not markedly. He could now move his arm ten degrees farther from the side than before, but still lacked 45 degrees of a normal range of what we call abduction. I found that the forward range of motion in the upward plane was the same as at my examination of July, 1949. In the elbow joint I found that the scar of the laceration had thickened considerably since my first observation, and I found that there was at this time some limitation in flexion at the elbow, of ten degrees. In other words, he couldn't have bent his arm up as far as he can in the opposite arm, the right arm, by ten degrees. At this [84] time he was still complaining of pain referable to the base of his neck and of some pain on compression of his ribs. But otherwise, the findings were essentially as at my examination of July.

Q. At that time, Doctor, did you have an opinion as to whether or not Mr. Bellamy was able to return to his duties as a railroad brakeman?

A. I felt that this man was not yet ready to

(Testimony of Leonard Barnard.)

return to duty as a railroad brakeman. I felt that he is going to show some improvement, and that his muscle power will improve in this arm, but I still feel that he is too uncertain and weak to hazard the occupation which he normally follows. I felt that probably that should go on for another two to three months, at least, before we should try it.

Mr. Digardi: May it be stipulated, gentlemen, that these are the X-rays of the Southern Pacific General Hospital relating to the care and treatment of Mr. Bellamy?

Mr. Bledsoe: I assume they are. Are those the ones that were in the deposition?

Mr. Digardi: These are the ones that were attached to the deposition.

Mr. Bledsoe: Yes.

Mr. Phelps: Yes.

Mr. Digardi: Will you mark these, Mr. Clerk?

The Clerk: As one exhibit? [85]

Mr. Digardi: As one exhibit. Then we can mark the others as we use them.

The Clerk: I will mark the envelope containing the X-rays plaintiff's exhibit 27 for identification.

(Whereupon envelope of X-rays referred to above was marked plaintiff's exhibit No. 27 for identification.)

Mr. Digardi: May it be stipulated, gentlemen, that I have here the hospital record of the Southern Pacific General Hospital relating to the care and treatment of Mr. Bellamy while a patient at that hospital?

(Testimony of Leonard Barnard.)

Mr. Phelps: Well, are those the records that were returned by the notary on the taking of the deposition?

Mr. Digardi: These are the records that were returned by the notary attached to the deposition.

Mr. Phelps: Stipulate that those are the records that were returned by the notary. I assume that they are the hospital records, but I don't want to stipulate that they may go into evidence at this time, yet.

Mr. Digardi: May they be marked for identification, your Honor?

The Clerk: The record is marked Plaintiff's exhibit 29 for identification, the supplemental report is marked plaintiff's exhibit 30 for identification.

(Whereupon hospital record and supplemental record referred to above were marked plaintiff's exhibit 29 and 30, [86] respectively, for identification.)

Q. (By Mr. Digardi): Doctor, I show you plaintiff's exhibits 27 and 28—or 29 and 30 for identification, and ask if you have had an opportunity to review those records.

A. I did, just this morning, yes, sir.

Q. Thank you, Doctor. I show you plaintiff's exhibit 27 for identification, which is an envelope containing X-rays. Have you had an opportunity to review those X-rays? A. Yes, I have.

Q. Doctor, I think you might at this time, with his Honor's permission, demonstrate what these X-rays show, to the jury.

(Testimony of Leonard Barnard.)

A. I have here an X-ray marked "William Bellamy," under the date of April 5, 1949, which is an antero-posterior view of the left shoulder and chest. This shows primarily the fracture of his left collarbone, this being the shoulder bone and this the neck, and these the lower ribs, the upper ribs, rather (indicating). Here is noted in the mid third a separation of the two bones, with one large, loose piece torn off at an angle. The rib fractures do not show well here, but are just visible in the lower pole.

Q. One moment, Doctor.

Mr. Digardi: Mr. Clerk, will you mark that the proper subdivision?

The Clerk: Mark this separately?

Mr. Phelps: May we have the date of that X-ray? [87]

Mr. Digardi: The doctor gave the date.

Mr. Phelps: I didn't hear it.

The Witness: April 5.

The Clerk: Exhibit 28 in evidence.

Mr. Digardi: Did you want to mark each one separately or subdivisions?

The Clerk: 27A in evidence.

(Whereupon X-ray film referred to above, dated 4/5/49, was received in evidence and marked plaintiff's exhibit 27A.)

A. (Continuing) I have here an X-ray dated April 5, 1949, marked "William Bellamy," and views disclosing the lower rib of the left chest. The

(Testimony of Leonard Barnard.)

fractures can be noted at this level here and here (indicating); that being the seventh and eighth ribs in the lateral angle. This is the vertebra and this is the pelvic bone (indicating).

Mr. Digardi: Mr. Clerk, will you mark that 27B?

The Clerk: 27B in evidence.

(Whereupon X-ray film referred to above, dated 4/5/49, was received in evidence and marked plaintiff's exhibit 27B.)

A. (Continuing) I have here a view dated April 4, 1949 and marked "William Bellamy," and a view of the left elbow joint, taken in the anterior-posterior plane with the arm in this position (indicating). And the film is beneath the arm. These little ones being the two bones of the forearm, and the shoulder joint would be in this relative position. Then the arm comes [88] down. On the other side the bony structures are normal, but on the other side here (indicating), the soft tissues, including the muscles and skin, can be noted to be markedly disrupted and to have lost their normal form as compared to, say, the straight line which is seen here on the inner side of the elbow joint—indicating considerable damage within the tissues of a soft nature on the outer aspect of the left elbow.

Mr. Digardi: Mr. Clerk, will you mark that 27C?

The Clerk: Yes, 27C in evidence.

(Testimony of Leonard Barnard.)

(Whereupon X-ray film referred to above, dated 4/4/49, was received in evidence and marked plaintiff's exhibit 27C.)

A. (Continuing) I have here a lateral view of Mr. Bellamy's arm, dated April 4, 1949, which shows normal bone and joint structures, this being the arm bone and this the forearm bone or bones (indicating). Here the defect in the soft tissues is noted somewhat posteriorly, but this view does not bring out that very clearly.

Mr. Digardi: 27D.

The Clerk: 27D in evidence.

(Whereupon X-ray film referred to above, dated 4/4/49, was received in evidence and marked plaintiff's exhibit 27D.)

A. (Continuing) I have here an antero-posterior view of the left shoulder of William Bellamy, dated April 19, 1949, disclosing the position of the fractured collarbone at this time, with some shortenings; the free fragment lying in this plane and the two bones overlapping a distance of approximately three fourths of an inch (indicating).

Mr. Digardi: Mr. Clerk, will you mark that 27—

The Clerk: 27E, in evidence.

(Whereupon X-ray film referred to above, dated 4/19/49, was received in evidence and marked plaintiff's exhibit 27E.)

(Testimony of Leonard Barnard.)

A. (Continuing) I don't see any point in showing all of these. They are just duplications at later dates, I think.

I have here an antero-posterior view of the left shoulder, dated October 3, 1949. This shows the fracture of the collarbone. It is now smoothed off and rounded, and the density above it indicates bone healing. We can see only one of the ribs showing at this plane here in the lower pole, with considerable healing about the swelling.

Mr. Digardi: Plaintiff's exhibit 27F in evidence.

The Clerk: 27F in evidence.

(Whereupon X-ray film referred to above, dated 10/3/49, was received in evidence and marked Plaintiff's exhibit 27F.)

Mr. Digardi: Doctor, do you have there an X-ray of Mr. Bellamy's left shoulder, taken in 1945?

A. Yes, this X-ray is dated October 5, 1945, marked "William Bellamy," and marked "left shoulder," showing his normal collarbone at that time, and the shoulder bone and his rib structures.

Q. Doctor, would you take one of these other X-rays showing the [90] fracture of the shoulder and put it in so the two can be compared, the normal shoulder with the fractured shoulder? You have plaintiff's exhibit 27A?

A. This is the left shoulder, dated April 5, 1949; this is October 5, 1945 (indicating). You may see the fracture at this side, the bone of the shoulder

(Testimony of Leonard Barnard.)

being intact in this position. And then in October of '45——

Mr. Digardi: Mr. Clerk, will you mark this October 1945 picture as plaintiff's exhibit next in order?

The Clerk: Plaintiff's exhibit 27G in evidence.

(Whereupon X-ray film referred to above, dated 10/5/45, was received in evidence and marked plaintiff's exhibit 27G.)

A. (Continuing) I have here an X-ray of the lower ribs, dated October 3, marked "William Bellamy," and the fractures of the ribs, I believe, can be seen in these two, which we previously saw, healed. This one was some overlapping, and this one in generally pretty good position. This is 8, there is a fracture also noted in other X-rays of 6, and this is 7 that is overlapping (indicating). This is a semi-lateral view with the spine being shown here (indicating).

Q. Now, Doctor, do your own X-rays show anything that these X-rays do not show?

Mr. Phelps: Well, object to that on the ground that would be a conclusion without the best evidence.

Mr. Digardi: Merely for the purpose, your Honor, of [91] determining whether or not he needs to show his X-rays to the jury.

Mr. Digardi: This is the last one, plaintiff's exhibit next in order.

The Clerk: Plaintiff's exhibit 27H in evidence.

(Testimony of Leonard Barnard.)

(Whereupon X-ray film referred to above, dated 10/3/49, was received in evidence and marked plaintiff's exhibit 27H.)

A. (Continuing): The only thing that I have here that would prove it is that this X-ray shows the fracture of the sixth rib as well; it was made in my office under date of July 27, 1949, in an antero-posterior view of Mr. Bellamy's left chest. You see here the sixth rib fracture is not yet solid. The seventh rib is healed with some overlapping, the eighth rib is healed in generally pretty good position.

Q. Before we go ahead, may I have your whole envelope marked?

Mr. Digardi: Mr. Clerk, I have here an envelope containing the X-rays taken by Dr. Barnard as previously referred to. Would you mark those as plaintiff's next number in order?

The Clerk: The envelope is marked Plaintiff's exhibit 28 for identification.

(Whereupon envelope of X-rays referred to above was marked plaintiff's exhibit No. 28 for identification.)

Mr. Digardi: And will you mark this X-ray the doctor has just demonstrated to the jury as plaintiff's exhibit 28A?

The Clerk: Plaintiff's exhibit 28 in evidence.

(Whereupon X-ray referred to above, dated 7/27/49, was received in evidence and marked plaintiff's exhibit 28A.)

(Testimony of Leonard Barnard.)

A. (Continuing) I believe these others just show the same healed clavicle as I showed in the last one.

Q. Doctor, do you have an X-ray showing the neck that you have mentioned?

A. This is an oblique view of the base of the neck and upper spine, made in my office on July 27, 1949, which does disclose some mild roughening about the anterior portion of the bodies, and some calcification of a minor degree which we would term a mild arthritic type of spine. But that is about all it does show.

Q. Thank you, Doctor.

Mr. Bledsoe: May we see the clavicle as of that date?

Mr. Digardi: Will you mark this plaintiff's next in order?

The Clerk: Plaintiff's 28B in evidence.

(Whereupon X-ray film referred to above, dated 7/27/49, was received in evidence and marked plaintiff's exhibit 28B.)

A. (Continuing) This is an anterior-posterior view of Mr. Bellamy's left shoulder, made in my office July 27, 1949. Here is the fracture of the collarbone or clavicle, as previously noted. This is that spicule which we noted as sticking downward, still in position (indicating). You will note that the collarbone is shortened, approximately, in my estimation, three fourths of an inch, with some overlapping; but in general [93] rounding off to what we call healing or union of the fracture.

(Testimony of Leonard Barnard.)

Mr. Digardi: Mr. Clerk, will you mark this photograph as plaintiff's exhibit next in order?

The Clerk: Plaintiff's exhibit 28C in evidence.

(Whereupon X-ray film referred to above, dated 7/27/49, was received in evidence and marked plaintiff's exhibit 28C.)

Mr. Digardi: And we offer in evidence as plaintiff's exhibit 27 the envelope containing the remaining X-rays which were not demonstrated, but we offer them all in evidence. And also plaintiff's exhibit 28.

The Clerk: 28 for identification.

The Court: It may be admitted.

The Clerk: Exhibits 27 and 28 in evidence.

(Envelopes referred to above were received in evidence and marked plaintiff's exhibits 27 and 28, respectively.)

Q. (By Mr. Digardi): Now, Doctor, you admitted that on Mr. Bellamy's last visit, you found a condition with reference to the scar on his left arm where the laceration was?

A. Yes, I found that the scar had thickened.

Q. Could you demonstrate that to the jury, please?

(To the Plaintiff): Mr. Bellamy, would you step forward, please?

(Whereupon the plaintiff came forward and stood in front of the jury box, and the doctor

(Testimony of Leonard Barnard.)

left the witness stand and stood facing the plaintiff in front of the jury box.) [94]

Mr. Digardi: Remove your coat, please.

(Plaintiff removed coat and rolled up sleeve.)

Mr. Digardi: Will you step up forward here where the jury can see better?

A. (Continuing): The thickening of the scar is in this level, the lower fold or pole, here, and it is quite hard compared to the scar, as you noted on the opposite side of it. I think that is the tendency to what we call keloid or the thickening of scars, which sometimes continues and has to be removed. He also has some localized tenderness at one fold here, indicating to my mind—and also some numbness below it—that he has severed a small cutaneous nerve at this part. The defect in the muscle, I think, is very readily seen, because that is raised again (indicating). Normally there should be a muscle of considerable size, and at this level, which runs between the arm and joint. He demonstrates some limitation of flexion compared to his opposite arm.

(To the Plaintiff): Bring that hand right down. He can bring this hand down easy, this one he can relax; with force, this one he doesn't quite come down. He has full power, but the scar tends to tighten.

Mr. Digardi: Thank you, Doctor. You may resume your seat, Mr. Bellamy.

(Witness resumed the witness stand and plaintiff resumed his seat in the courtroom.)

(Testimony of Leonard Barnard.)

Q. Doctor, on plaintiff's exhibit 29 for identification, there is an operation record in the hospital record. Have you observed that record of operation?

A. Yes, sir, I have; this morning.

Mr. Phelps: May I see it, see what it is?

(Document examined.)

Q. (By Mr. Digardi): Doctor, will you read the portion which states, "Procedure under the operation to the injury——"

Mr. Phelps: May I see, if your Honor please, so the record will be clear? I have no objection to the portion he is now offering of the hospital records. I would have objection to portions of them, possibly. I would like an opportunity as they are offered to state them. I don't want to be understood as now conceding that the whole record is proper.

The Court: You are not objecting to this part?

Mr. Phelps: No, your Honor.

A. (Reading):

"Under satisfactory pentothal anaesthesia, the skin of the left arm was cleansed with ether, soap and water, and merthiolate. The laceration itself was thoroughly cleansed with soap, water and irrigated with saline solution. Examination of the traumatized area revealed laceration of the muscle bellies of the brachialis anterior and the flexor carpi radialis. There was no evident damage to [96] any tendons, major nerve or major blood vessel. The wound was debrided, removing a considerable quantity of devitalized skin, fat and muscle. Muscle

(Testimony of Leonard Barnard.)

fascia was approximated with a few sutures of 0 plain catgut, the skin was closed with interrupted sutures of medium dermalon after a tissue drain was placed in the wound. The arm was placed in ten degrees flexion of the elbow, immobilization being obtained by means of molded posterior plaster splint."

Q. Doctor, it states here that a considerable quantity of devitalized skin, fat and muscle was removed. What is the effect of that?

A. Well, that would be permanent loss of that tissue in the man's body. If you remove a portion of a muscle, you weaken that muscle.

Q. Now, Doctor, in your opinion, based on what Mr. Bellamy told you, what you found on your examination of him, what you found in the X-rays you took in your office and what you found as a result of your review of the hospital records and X-rays of the Southern Pacific General Hospital, will Mr. Bellamy have any permanent disability as a result of this accident?

Mr. Phelps: Well now, the only objection I want to call to your Honor's attention is the inclusion of all the hospital records, which are, of course, not yet in evidence; and I object [97] to it if he includes that.

Mr. Digardi: Well, if that is all, I offer in evidence the record of the Southern Pacific General Hospital as plaintiff's next.

The Court: I don't think it is necessary to put

(Testimony of Leonard Barnard.)

that record in evidence. If the doctor has seen the record, it has been identified by him, and he said he had read it over and it has been stipulated that that was the record.

Mr. Phelps: Certainly, your Honor.

The Court: So I don't see any necessity to put it in evidence unless you have some particular thing. He can base his opinion upon the record as well as the other facts that were given.

Mr. Phelps: Very well, your Honor.

Mr. Digardi: Would you answer the question, please, Doctor?

A. My opinion, based on the examination of this man and his history, and the X-rays, is to the effect that he will have permanent disability, which I would itemize as follows: First, he is going to have some permanent limitation of motion in his shoulder joint. I do not believe it to be quite as great as at the present time, but it will be, I should say, 20 per cent loss of shoulder motion; second, he is going to have permanent shortening of his collarbone, with a permanent knob or deformity on the left, which, while not especially disabling, [98] is a permanent condition. He is going to have some permanent weakness with reference to the function of his left elbow joint, owing to the fact that he lost considerable of the muscle structures which function to move the elbow joint. He is going to have also a small degree of skin anaesthesia below the scar, owing to the fact that the laceration cut some of

(Testimony of Leonard Barnard.)

the nerves to the skin in that area. I believe that summarizes it.

Q. Doctor, in your opinion, will he have any permanent weakness of the left arm?

A. He will have permanent weakness in the left arm, secondarily; first, some shortening of the collarbone and some changes in the shoulder joint from long periods of being held still. Second, some loss of muscle structure is noted in the scar of his elbow.

Q. Doctor, you mentioned he had a certain condition with reference to his neck or back between the shoulders. To what do you attribute that?

A. I attribute that primarily to the trauma of his accident. I think a forced blow, striking an elbow and shoulder hard enough to fracture the collarbone and break several ribs, must also transmit some force to his neck and back. I do not believe, however, from my examination, that that will be of a permanent nature.

Mr. Digardi: Thank you, Doctor. I believe that is all. [99]

(Upon the plaintiff being excused, the following occurred.)

Mr. Digardi: Mr. Bledsoe, may it be stipulated that Mr. J. E. Carlson was the driver of the car, the pickup truck that ran into Mr. Bellamy, and that at the time of the accident he was an employee of the Pacific Portland Cement Company and acting within the scope and course of his employment?

Mr. Bledsoe: Yes, with the exception of the inference that he ran into the man. It may be a quibble, but without reference to who ran into whom, we will stipulate that the man was driving in the scope of his employment on behalf of the Pacific Portland Cement Company.

Mr. Digardi: Thank you, Mr. Bledsoe.

Mr. Hepperle: Mr. Edwards, will you come forward, please?

FRANK G. EDWARDS

called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the court and jury?

A. Frank G. Edwards.

Direct Examination

By Mr. Hepperle:

Q. Where do you live, Mr. Edwards?

A. 2175 Twelfth Avenue.

Q. And who do you work for?

A. Southern Pacific Company. [157]

Q. In what capacity?

A. Locomotive engineer.

Q. How long have you worked for the Southern Pacific in that capacity? A. 24 years.

Q. How long have you been a locomotive engineer? A. Eight years.

Q. On April 4, 1949, you were working down at Redwood City along the harbor road at about 5:35 p.m.? A. That's right.

Q. Who was the conductor?

(Testimony of Frank G. Edwards.)

A. George Lechner.

Q. And do you recall the names of the other members of the crew?

A. Husson and Quinlan and——

Q. Mr. Bellamy?

A. And Mr. Bellamy and the fireman.

Q. Now, directing your attention to about 5:35 p.m., and a movement out of the spur going into the paraffine plant, do you recall such a movement?

A. Yes, sir.

Q. Who was in charge of the movement at the time? A. Excuse me. Mr. Husson.

Q. Mr. Husson? A. Husson.

Q. And in charge of the movements of the train generally? [158] A. Mr. Lechner.

Q. Mr. Lechner, the conductor. How many cars did you have ahead of the engine?

A. Three.

Q. And how many behind? A. Two.

Q. And you were in the cab of the engine on the right side next to the road?

A. That's right.

Q. Were you able to see any members of the crew from your position?

Mr. Bledsoe: At what time?

A. As you were backing out of the spur?

Mr. Phelps: At what point on the spur? May I ask that the question be tied down to the particular point?

The Court: Yes, I think you had better place the point.

(Testimony of Frank G. Edwards.)

Q. (By Mr. Hepperle): At any point while you were backing out of the spur, Mr. Edwards, were you able to see any other members of the crew?

Mr. Phelps: Well, that is indefinite.

The Court: I don't think so. I will allow it.

A. Mr. Bellamy on the point of the car nearest the engine, and the conductor across the road on the shoulder of the highway, south side of the road.

Q. Were you able to see Mr. Quinlan? [159]

A. No.

Q. State whether or not there is a curve at that point. A. There is.

Q. Did it obstruct your view? A. Yes.

Mr. Phelps: Now I will object to that once again, if your Honor please, as to what particular point. I think we are getting into something. We ought to tie it down somewhere. When you are getting into an obstruction to the view. I will object upon that ground, that it is indefinite and uncertain.

The Court: Yes, I think you ought to make that point more definite.

Q. (By Mr. Hepperle): Looking toward the east, Mr. Edwards, would you state whether or not the curve obstructing your view——

Mr. Phelps: At what point on the curve, is my point, your Honor.

Mr. Bledsoe: And his view of what? I would like to know. His view might be obstructed over to the left and not to the right.

(Testimony of Frank G. Edwards.)

The Court: Well, you can bring that out on cross-examination. I will allow the question.

Q. (By Mr. Hepperle): You may answer, Mr. Edwards.

The Court: You were on a curve, it is a rather continuous curve no matter where you are.

Mr. Phelps: I shan't comment. I thought the curve wasn't [160] the same by the diagrams, your Honor. That is the reason I made the objection; it wasn't a consistent, straight curve.

The Court: Well, it was a curve, apparently, by the diagram—but that is for the jury to determine.

A. My view was obstructed.

Q. (By Mr. Hepperle): And how about looking toward the west from the cab of the engine?

A. Yes, it was obstructed there.

Q. In other words, your view was obstructed both ways by the curve? A. Yes.

Q. Now you have mentioned Mr. Bellamy riding the end of the car at the front of the engine. Where on the car was he riding?

A. On the short ladder immediately in front of the engine.

Q. Did you have your eye upon him as you backed out of the spur? Were you watching him?

A. Yes.

Q. Did you see him do anything? Did you see him leave the car? A. Yes.

Q. Will you state whether or not he left the car in the regular manner? A. Yes.

(Testimony of Frank G. Edwards.)

Mr. Phelps: Objected to as calling for the opinion and conclusion of the witness, asking him what he did, what he saw him do, but not the "regular manner"; it is calling for an [161] opinion and conclusion.

The Court: Well, it is somewhat leading, but I will allow it.

Mr. Phelps: And leading.

Q. (By Mr. Hepperle): Did you see what he did after he left the car? Mr. Bellamy?

A. Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating).

Q. State whether or not this was in accordance with the usual procedure at that point.

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial—the usual procedure at that point.

Mr. Hepperle: The man is an expert railroad man, your Honor.

Mr. Phelps: Well, anything might cause—I don't know that that is proper, your Honor.

The Court: That is calling for his conclusion.

Mr. Phelps: It is calling for an opinion and conclusion and leading and suggestive.

The Court: Just reframe the question.

Q. (By Mr. Hepperle): Will you state whether or not, Mr. Edwards, there was anything unusual in the position taken by Mr. Bellamy?

A. No.

(Testimony of Frank G. Edwards.)

Q. What was the next thing that you noticed? We had gotten [162] you up to the point where Mr. Bellamy was in the road passing signals to you. What happened next?

A. This truck came around the corner, around a curve from the east.

Q. Did you have a chance to estimate its speed?

A. Around 30 miles an hour.

Q. What happened next?

A. Mr. Bellamy was facing the engine. He didn't see the truck the truck driver swerved to the south side of the road to try to prevent hitting Mr. Bellamy, and the rear end, the rear fender, caught Mr. Bellamy in the back.

Q. Now, let's back up just a moment. As the car came around, or as the truck came around the curve, where was it in the road? That is, which lane was it in, or would you just tell us where it was?

A. In the lane going toward Redwood City; it would be the north lane.

Q. In the north lane?

A. North lane, yes.

Q. Between the center line and the north edge of the road? A. That's right.

Q. And it continued on toward Mr. Bellamy?

A. It swerved toward the center. The driver swerved toward the center when he saw Mr. Bellamy.

(Testimony of Frank G. Edwards.)

Mr. Bledsoe: We move to strike the conclusion as to what [163] the driver saw.

Mr. Hepperle: That may go out, your Honor.

The Court: The statement, "When he saw Mr. Bellamy," may go out. The rest of the answer may remain in.

Q. (By Mr. Hepperle): The point I am getting at, Mr. Edwards, is, how far was the truck from Mr. Bellamy at the time that it began to swerve?

A. Oh, a distance of about 20 feet.

Q. What happened next?

A. Oh, the rear end struck Mr. Bellamy in the back and tossed him into the road between the cars and the truck itself.

Q. Did you hear any sound of any horn from the truck before the collision?

A. None whatsoever.

Q. Did you hear any other warning of any type?

A. No.

Q. Did you see whether or not the brakes were applied on the truck? A. Yes.

Q. At what point were the brakes applied, or when?

A. After Mr. Bellamy had been struck, there were skidmarks on the road.

Q. About how long were the skidmarks?

A. About 30 feet.

Q. And what was the condition at that time in respect to [164] visibility?

(Testimony of Frank G. Edwards.)

A. It was broad daylight.

Q. And as to visibility, was it good or bad otherwise?
A. Very good, clear.

Q. What, if anything, did you do after the collision took place?

A. I climbed down off the engine and went over to the driver's side of the truck and took the information on the registration card on the steering post.

Q. And after you had done that, did you see where the driver was?

A. He was in the neighborhood of the truck there.

Q. Did you go up to him?

A. He spoke to me, said that he was in a hurry to get to the post office with the mail.

Mr. Hepperle: Will you mark these two pictures, Mr. Clerk? Two pictures from the group formerly marked altogether as exhibit AA?

The Clerk: These are going to be your exhibits, are they not?

Mr. Hepperle: Yes.

The Clerk: Marked 39 and 40 for identification.

(Whereupon photographs referred to above were marked plaintiff's exhibits 39 and 40 for identification.)

Q. (By Mr. Hepperle): I show you exhibit No. 40, Mr. Edwards, and ask you if that is the truck involved in the accident. [165]

(Testimony of Frank G. Edwards.)

A. That was the truck—I think it is; it is very similar to that, anyway. I am not positive whether it is another truck or not.

Mr. Hepperle: We offer in evidence plaintiff's exhibit No. 40.

The Court: It may be admitted.

The Clerk: Plaintiff's No. 40 in evidence.

(Whereupon plaintiff's exhibit No. 40 for identification was received in evidence.)

Q. (By Mr. Hepperle): I show you plaintiff's exhibit No. 39 (handing to witness), and ask you whether the mark shown in the picture is the skid-mark you have previously referred to.

A. It is just about where it was.

Mr. Hepperle: We offer plaintiff's exhibit No. 39 in evidence. I will show it to the jury.

The Clerk: No. 39 in evidence.

(Whereupon plaintiff's exhibit No. 39 for identification was received in evidence.)

Mr. Phelps: Does the record indicate, or can it indicate, when those last pictures were taken?

Mr. Digardi: I think Mr. Bledsoe may be able to state.

Mr. Bledsoe: There is a date on the back; they were taken the 6th of April, 1949, two days after the accident happened.

Q. (By Mr. Hepperle): I show you plaintiff's exhibit 31 for [166] identification, Mr. Edwards, and ask you if that indicates in a general way the

(Testimony of Frank G. Edwards.)

view from the engine, from the cab of the engine?

A. In a general way, yes.

Mr. Hepperle: We offer in evidence plaintiff's exhibit No. 31, your Honor.

The Court: It is already in.

Mr. Hepperle: Mr. Phelps objected to it on a prior point, your Honor.

Mr. Phelps: No, I have no objection as long as it is now qualified with a foundation. None at all. My only point is, may the record show, will you bring out from the witness, at what point it shows his view? In other words, my understanding is that, and I think the picture will clearly show, the front end of the pilot was at about the frog at that time, about at the switch stand at that time.

Mr. Hepperle: Could we further stipulate, Mr. Phelps,——

Mr. Phelps: And Mr. Edwards was the engineer when the picture was taken, so you can ask him. Bring it out from him.

The Court: Well, the point is, you called it exhibit 31. If it is not in evidence, then it must be for identification. If it is in evidence, there is no need in putting it in again.

Mr. Phelps: It was for identification.

Mr. Hepperle: I should have stated, your Honor, it was exhibit 31 for identification. [167]

Q. I show you the picture again, Mr. Edwards, and ask you if you know from what point the picture was taken; that is, how far from the engine, if at all?

(Testimony of Frank G. Edwards.)

A. You mean where the camera man was standing?

Q. Yes.

A. Oh, he had his camera right on the edge of the road, on the pavement.

Q. And where in relation to the side of the engine?

A. On the pavement, probably part on the pavement and part on the ground.

Q. And at a higher point in the cab of the engine, would you be able to look out and have the same view, or is this picture out from the engine, further out from the engine than you were heading?

A. He would see more than I would see—the camera would show more than I would see. (Photograph handed to the jury.)

Mr. Hepperle: So that the record may be clear, your Honor, may we reoffer exhibit 31 for identification into evidence at this time?

Mr. Phelps: I have no objection except, can we establish where the front end of the locomotive was at the time it was taken? That is all I would like to have you do. If you can't, all right.

Q. (By Mr. Hepperle): Can you tell us where the front end of the locomotive was, Mr. Edwards?

A. Right on the switch. [169]

Mr. Phelps: Thank you. No objection.

The Court: Well, the document will now be admitted in evidence and marked plaintiff's exhibit 31.

(Whereupon plaintiff's exhibit No. 31 for identification was received in evidence.)

(Testimony of Frank G. Edwards.)

Mr. Hepperle: You may cross-examine.

The Court: Before we start in, we will take the usual recess; ten minutes, ladies and gentlemen. During the recess will you bear in mind the admonition this court has heretofore given you.

(Recess.) [169]

Mr. Hepperle: With your Honor's permission, I should like to ask a couple of additional questions. Mr. Edwards, are you familiar with the traffic on Harbor Road in the vicinity of this accident?

A. Yes.

Q. Will you state what it was?

A. About normal, medium.

Q. What did the traffic consist of?

A. Cement trucks and trailers.

Q. You have already told the Court that you had two cars behind the engine and were backing out of this spur and that your view was cut off. Will you state whether or not there was anyone at the rear of the train as you were backing?

A. No.

Mr. Hepperle: You may cross-examine.

Afternoon Session, November 2, 1949

Cross-Examination

By Mr. Phelps:

Q. Mr. Edwards, if I understand correctly, you were coming out on this spur with three cars, and at the time you were coming out of here your con-

(Testimony of Frank G. Edwards.)

ductor, you state, was in a position south of the road, is that correct? A. That is correct.

Q. And can you tell us about where, with relation to the switch, approximately?

A. Almost opposite the switch.

Q. Almost opposite the switch? A. Yes.

Q. A little east or a little west?

A. More than likely a little east.

Q. A little east, and off the pavement entirely?

A. There is sort of a ridge on the side of the road, and he was standing on that ridge.

Q. Sort of a little mound?

A. A little mound.

Q. In a position, then, where he could see both ends of his cut of cars?

A. That is right.

Q. Is that right? A. That is right. [123]

Q. And he was in that position, was he not, in order to pass signals and direct that movement, wasn't he? A. That is right.

Q. And he was in a position, because of this curve, stationed himself in that position so he could see the front end of the train, the rear end of the train, and see his men? A. That is right.

Q. All right. Then do you remember whether he gave a signal to start that movement?

A. No, the signal was given by Mr. Husson to start the movement out of the plant.

Q. You don't remember whether he relayed it?

(Testimony of Frank G. Edwards.)

A. No.

Q. You don't remember. Then as you were backing up, then, you were to take your signals from Mr. Lechner, the conductor, as well as any other man in that crew, were you not?

A. That is right.

Q. He at all times during this entire movement, as far as his position was concerned, remained in your view, didn't he? A. That's right.

Q. So that you could always see him and he was in a position to pass any signals from any man on the crew, was he not? A. That is right.

Q. And he was in a position to pass any signals whether any other man in that crew disappeared from his view or not; isn't [124] that true?

A. That is right.

Q. Now, then, in such circumstances, having in mind the custom and practice of railroading in such circumstances, and having in mind any rule, including Rule 7-B, a portion of which has been read into evidence, can you tell us whether or not when Mr. Bellamy dropped off the engine or the car, and if he had then stayed where he was and then had disappeared from your view, can you tell us whether or not as an engineer of that locomotive, you would then have stopped?

A. We are not required to stop.

Q. No. In other words, you are not required to stop when a man disappears from your view when he is behind you in the direction of movement?

(Testimony of Frank G. Edwards.)

A. No.

Q. The only time you are required to stop is when a man disappears from view, then, is when he is on the lead end of a cut and he is your eye?

A. That is right.

Q. In other words, when you see him drop off and there are cars ahead of you and you are taking signals from him, if he disappears from your view, then you stop? A. That is right.

Q. And once a man has stepped down off a box-car and has gotten himself off without falling, you have assured yourself that he has [125] safely alighted, so far as your operating of the engine is concerned, it doesn't make any difference whether he disappears from your view or not? A. No.

Q. You are not concerned with what he does?

A. No.

Q. So long as you have other men to take your signals from, is that correct?

A. That is right.

Q. Another rule was read yesterday, Rule 104-C was read to you saying that:

“An Employe, alighting from a moving train to change position of a switch behind such train, must get off rear of rear car when practicable, or, when not practicable, on opposite side of track from switch stand, unless it is unsafe to do so. While a train is moving over a switch, any employe in the vicinity of such switch must take position on opposite side of track from switch stand when prac-

(Testimony of Frank G. Edwards.)

licable, and, when not practicable to do so, must take position not less than twenty feet from the switch stand.”

Now, first, Mr. Edwards, let me ask you, preliminarily, were you engaged in a movement of a train or were you engaged in a switching operation in yard limits?

A. Switching operation in yard limits.

Q. Does that rule have any application in a switching movement [126] in yard limits?

A. That is a main line rule.

Q. So that it didn't apply to this move as you were making it on that day when Mr. Bellamy was hurt, is that true? A. True.

Q. And even if it did, is it not true that that rule would only require a man, so far as the twenty feet is concerned, to remain twenty feet away from the switch stand if he is on that side of the track?

A. That is right.

Q. In fact, the rule is very clear that that is what the rule means; and the purpose of that rule is so that a switchman won't be so close to a switch, to keep him away from the switch so that he won't throw the switch while the rear trucks of a car are still going over the switch and derail it? Isn't that what the purpose of the rule is?

A. That is right.

Q. So much for the rules of the road, then. Now, then, Mr. Edwards, as you were coming out of there

(Testimony of Frank G. Edwards.)

and backing up, that was a backup movement for you? A. Backup movement.

Q. All the controls are on your side of the locomotive? A. That is right.

Q. The throttle and the brakes and everything but the bell? A. You have a bell, too. [127]

Q. You have a bell, too? A. Yes.

Q. When Mr. Bellamy dropped off, had you seen him before he dropped off of the car?

A. Coming out of the plant, I had looked at him before he dropped off.

Q. Did you see him immediately prior to his dropping off?

A. At the time he dropped off, I saw him.

Q. And just before he dropped off, did you see him? A. Yes.

Q. Did you at any time see him as he was moving there and you watched him, did you see him look back in the direction towards the harbor?

A. I had looked in the direction towards Redwood City on the way out. He might have been looking back at the time I was looking in that direction, the direction of the movement of the train.

Mr. Phelps: I am not asking you as to what he might have done. I ask that the answer be stricken. My question was very simple.

Q. So far as your observation was concerned, did you or did you not see him look back?

A. I did not.

The Court: I will allow the answer to remain. It shows the limit of his testimony. [128]

(Testimony of Frank G. Edwards.)

Mr. Phelps: I think that is very true.

The Court: He wasn't looking.

Q. (By Mr. Phelps): You weren't looking all the time? A. Not all the time, no.

Q. But you did see him as he dropped off?

A. Yes.

Q. And immediately before he dropped off, because, obviously, Mr. Edwards, it was also your duty to watch the conductor across the road as well as the other cars behind you and the other men?

A. That is right.

Mr. Phelps: I have no other questions.

Q. (By Mr. Bledsoe): Mr. Edwards, you went immediately to the driver of the automobile, did you not?

A. I went to the side of the truck to get the information off of the registration card on the steering wheel.

Q. And the very first thing the driver said to you was that he was in a hurry to get to the post-office with the parcels; you didn't say anything to him before that? A. No.

Q. He just blurted that out to you?

A. He said he was in a hurry to get to the post-office with the mail before the postoffice closed.

Q. Now, you were interviewed by the police after this accident? A. No.

Q. Didn't the police——[129]

A. I saw the police there, and they asked how

(Testimony of Frank G. Edwards.)

it had happened. I guess you would say it would be interviewed.

Q. Didn't you tell them how it happened?

A. I told them that the man stepped off the car and the truck came along and hit him in the back with the rear fender.

Q. As a matter of fact, the man, Mr. Bellamy, was moving at the time he was hit, wasn't he?

A. He was moving towards the center of the road.

Q. And he was backing up, wasn't he?

A. He was sort of sidestepping toward the center of the road.

Q. Wasn't he moving backward against the flow of traffic?

A. More sidestepping.

Q. Wasn't he backing against the current of traffic and backing into the road?

A. No, he was more sidestepping.

Q. You remember being interviewed by someone on behalf of the Southern Pacific about the accident on April 5, 1949, about noon time, the day after the accident, a Mr. Horgan or Hogan or some such name as that witnessed your signing of a statement?

A. Hogan? I don't recall that name.

Q. Let me show you this statement and ask you if this has your signature on it.

A. Oh, yes, yes.

Q. That is your signature? A. Yes. [130]

(Testimony of Frank G. Edwards.)

Q. Would you read it over, please. Read the whole thing starting at the front page.

A. Uh-huh (affirmative).

Q. As a matter of fact, you have seen this statement before, haven't you? A. Yes.

Q. And you were interviewed by someone in Mr. Hepperle's office and shown the statement there? A. Yes.

Q. And you recall now, do you not, the occasion that you gave such a statement? A. Yes.

Q. And this was the day after the accident?

A. Yes.

Q. And your memory of the accident was pretty fresh at that time, I assume? A. Yes.

Q. I will ask you if at that time you stated this way:

“Was he standing still at the time he was struck?”

“A. No.

“Q. Which way was he moving, or how was he moving?”

“A. He was backing against the current of traffic, backing into the road.”

Is that correct? A. That is right. [131]

Q. Did he at any time while you watched him look in the direction that the truck approached?

A. No, not after he had alighted from the car.

Q. Can you tell me whether or not the bell was ringing on your engine? A. It was.

Q. How many pounds is that bell, do you know?

A. I think they are about 80 pounds.

(Testimony of Frank G. Edwards.)

Q. Does it make a lot of noise?

A. It does considerable.

Q. You yelled at Mr. Bellamy to look out, didn't you?

A. Yes.

Q. You saw the car coming before it even swerved, did you not?

A. Before the driver swerved?

Q. Yes. A. Yes.

Q. And for what distance did you see it coming?

A. Oh, about 70 feet.

Q. That is the entire distance you saw it coming before the accident happened?

A. Maybe a hundred feet.

Q. 75 or 100 feet?

A. Somewhere in that neighborhood.

Q. And the right rear fender is what collided with Mr. Bellamy?

A. That is right. [132]

Q. I have just one other question. I wasn't clear about the picture, Plaintiff's Exhibit 31. Is Plaintiff's Exhibit 31 supposed to be the position that your engine was in at the time this accident happened?

A. Yes.

Mr. Bledsoe: That is all. [132-A]

Recross-Examination

By Mr. Phelps:

Q. But of course the head brakeman is not required to be in your view at all times, is he?

A. There's times when he can not be in the view of the engineer.

(Testimony of Frank G. Edwards.)

Q. Why, of course. And so again, as long as there is one man in view, that is all that is necessary. All right. Now, then, one other thing: the conductor, is he not, is the man in charge of this movement? He is in charge of the train?

Mr. Hepperle: Beg your pardon, your Honor. I think that question is compound. I wish it rephrased as to whether the conductor was in charge of a train or of the movement.

Mr. Phelps: I will rephrase it.

Q. The conductor is in charge of the crew, isn't he?

A. The conductor is in charge of the crew.

Q. That's right. And the conductor, he is giving signals and is in a position to see—he is in charge of a movement, isn't he?

A. The conductor has a tag man working under him that usually does the switching moves.

Q. Yes. But the tag man in this case was Mr. Husson, wasn't he? A. Yes.

Q. And the tag man is the man that carries a switch list? A. That's right.

Q. And so far as the conductor is concerned, and in this move [133] particularly, where he had got cars ahead of the engine in your direction of movement and cars behind your engine in the direction of movement, and where there is nobody out on the point riding out here at the head end of your train in the direction of movement, and where your conductor is the only one that can see the

(Testimony of Frank G. Edwards.)

head end of those cars, your conductor is the man from whom you should take your signals and in charge of the movement, isn't that correct?

A. Any member that is in view that has either end of the train in view is the man I would take the signals from.

Q. You bet your sweet life. You bet. And you would take the signals from the man who was in charge on that particular move, for the safety of everyone—the man that can see the front end of your train as well as the rear end, isn't that true?

A. Yes.

Q. So now, isn't it a fact, then, on this very move, where the conductor was the only man that could see the front end of your train when you were moving——

Mr. Digardi: I object to that, your Honor, because there is no evidence that Mr. Bellamy could not see the front end of the train. He is assuming facts not in evidence.

The Court: Let him finish the question and then I will sustain the objection.

Mr. Phelps: All right. Well, I will still make the question because I think it is proper, and I think the facts will [134] speak for themselves. With deference, if I may.

The Court: You are assuming in your question that the conductor was the only man that could see the other end, the west end of that train.

(Testimony of Frank G. Edwards.)

Mr. Phelps: In the position he was in, yes, your Honor.

The Court: The position he was in. Now, there is no evidence that Bellamy couldn't see it. The witness has just stated that he took signals from either party that could see it.

Mr. Phelps: To take signals from either party that could see it.

The Witness: That's right.

Mr. Phelps: But when a man—well, I will withdraw that and put it this way to you.

Q. When you saw Mr. Lechner station himself across the highway you knew that one of his purposes in stationing himself over there was so he could see both ends of your cut, didn't you?

A. That's right.

Mr. Digardi: One moment. I object to that as calling for the opinion of this witness as to what the conductor had in mind at the time. I don't think this witness knows what was in the conductor's mind at that time. We might get that from the conductor.

The Court: Well, I will allow it. The conductor is here.

Mr. Phelps: You can bring it out from the conductor if you wish. [135]

Q. Now, then, in that position you did know this, though, that across the road he was in a position to see the front end of your cut as well as the rear end of your cut?

(Testimony of Frank G. Edwards.)

A. He could see the complete movement.

Q. That's right. And a man in that position on the outside of your curve like that, where he can see both ends, is the man in charge of the movement, is he not?

A. He is in charge of the whole crew, the whole movement and everything.

Q. And the whole movement, is he not? That particular movement?

A. (Nodding in the affirmative.)

Q. All right. Now, then, one other thing that we haven't gone into. These tracks cross Bayshore Highway west of there? A. Yes.

Q. About how far?

A. 800 to a thousand feet.

Q. Just west of Bayshore Highway the tracks continue down and along Chestnut Street, do they not, in Redwood City?

A. I am not familiar with the name of the street, but they continue toward Redwood City.

Q. But they do continue on a street, on a paved street? A. Street track, yes.

Q. And right in the street itself, aren't they?

A. Yes. [136]

Q. For some considerable distance, the very track you had been on?

A. Probably three quarters of a mile.

Mr. Phelps: I have no other questions.

Mr. Hepperle: That is all.

Mr. Bledsoe: That is all, your Honor. [136A]

Mr. Hepperle: We would offer in evidence, your Honor, defendant's Exhibit D, being the statement previously referred to by Mr. Bledsoe, and upon which the witness was cross-examined.

Mr. Bledsoe: We will object to that, because there are certain items in there that are not admissible in evidence, I think Counsel knows that very well, and it is incompetent, irrelevant and immaterial, being used only for impeachment purposes.

The Court: If there is anything in there that reflects upon this impeachment one way or the other, I think it is admissible. Let me see it, would you?

Mr. Hepperle: We offer it, your Honor, solely for the purpose of reading the whole statement.

The Court: While I think that the statement should be admitted there are statements made in it that should be read in connection with the statement that has already been read to the witness, to the jury and to the Court. Admitted.

Mr. Hepperle: With your Honor's permission, I should like to read it to the jury at this time.

(The statement of Frank D. Edwards was marked Defendant's Exhibit No. 41 in evidence.)

The Court: Just a minute. Before you start reading it, the grand jury is coming in here.

Mr. Hepperle: Yes, your Honor. [185]

The Court: They will make a little commotion.

(Pause.)

Mr. Hepperle: Shall I proceed, your Honor?

The Court: Yes.

Mr. Hepperle: (Reading) "Statement of Engineer Frank G. Edwards, taken at the office of Trainmaster, San Francisco, in connection with personal injuries sustained by Brakeman William A. Bellamy at Redwood Junction, April 4, 1949, when he was struck by a truck. Interrogations by Mr. W. L. Stiles, Claims Department. Reported by Mrs. Mary Roberts.

San Francisco, April 4, 1949

12:07 p.m.-12:20 p.m.

By Mrs. Roberts:

Q. Will you state your full name?

A. Frank G. Edwards.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been employed by the Southern Pacific Company?

A. Since October, 1925.

Mr. Stiles: Were you engineer on Engine 2345 on April 4, when Brakeman Bellamy was injured at Redwood Junction? A. I was.

Q. Will you please tell us in your own words all the [186] facts and circumstances in connection with this injury?

A. While backing out of Paraffine Company's spur at Redwood Junction Brakeman William A. Bellamy dropped off end of car next to engine at main line switch on right side of engine, and was struck by pick-up truck license number Com. B. C. 89-82 Cal. '49 operated by J. E. Carlson, 353 Santa Clara Street, Redwood City. Operators license 884197. Truck registered to Pacific Portland Cement Company, 417 Montgomery Street, San Francisco, California. Brakeman Bellamy was standing on Harbor Road alongside main track about ten feet from side of car facing engine with back to current of traffic on road. Truck approaching from cement plant passed other members of crew about one hundred feet from point of accident and on rounding curve driver saw man following engine and tried to steer car to left side of road to avoid striking him. Brakeman was struck by right rear fender of truck and thrown toward train. Truck driver did not attempt *to after* brakeman was hit.

Q. When Brakeman Bellamy dropped off the car how long was he on the ground before he was struck? A. Just a matter of seconds.

Q. What were his actions after dropping off? Did he step into a line of traffic?

A. Ten feet would be center of the road. Towards the [187] center of the road.

Q. Was he standing still at the time he was struck? A. No.

Q. Which way was he moving or how was he moving?

A. He was backing against the current, backing into the road.

Q. Which way was Bellamy looking?

A. In my direction.

Q. Did he at any time while you watched him look in the direction the truck approached?

A. No.

Q. Is it your opinion that this truck was moving at excessive speed?

A. For the condition of everything there, I think he was.

Q. How far was the curve that this truck came around from the point where Bellamy was struck?

A. I could see other members of crew and we had two cars between engine and where they were standing. About two car lengths from point of engine.

Q. It was daylight? A. Yes.

Q. Signals being passed by hand? A. Yes.

Q. Was pavement dry? [188] A. Yes.

Q. Mr. Bellamy didn't trip or stumble before being struck? A. No.

Q. In your opinion Mr. Bellamy did not see the truck that struck him before he was struck?

A. No.

Q. Since he was struck by the rear end of the truck that would give the impression that he was in the clear when the first part of the truck went past him? A. That's right.

Q. Is there any reason that you know of why truck driver should not have been moving as he was in the street at that time?

A. No, he should have been driving slower. When he first saw members of the crew on the curb he should have slowed down."

The Court: I am going to strike that out, ladies and gentlemen, that last statement. I admonish you to disregard it because it is a conclusion of the witness and not what he actually observed—those two statements were what he should have done, and I admonish you to disregard it.

Mr. Hepperle: The next question was "Can you estimate his speed?"

A. About 30 miles an hour.

Q. Did he have any conversation with you or in your [189] presence regarding what he was or how he came to strike the brakeman?

A. No, except he said he had driven 35 years and it was the first accident he had. He was quite upset about it.

Q. Were there any other witnesses that you know of other than train crew and truck driver?

A. No.

Q. No other automobiles or persons?

A. No, not at the (repeating) not at the immediate time. If there had been another vehicle coming in the opposite direction he probably would have had a collision.

Q. That would indicate he was over in the wrong lane?

A. Yes, in order to avoid Brakeman Bellamy.

Q. There was no crossing involved?

A. No. It happened directly opposite P. G. & E. Substation of Redwood City, directly opposite the gate to the plant on the south side of the road.

That is all.

12:20 p.m.”

Each page is being signed by E. J. Horgan and F. G. Edwards. The statement concludes: “I, F. G. Edwards, have read the foregoing statement of three pages and it is true and correct to the best of my knowledge and belief.”

The Court: Gentlemen and ladies and gentlemen of the trial jury: The Grand Jury is now here to report. That may [190] take a few minutes, and it is close to four o'clock, so I think I will recess this trial until 10 o'clock tomorrow. So you may go now. Before you go I wish to tell you to bear in mind the admonition that the Court has heretofore given you.

Mr. Bledsoe: Will your Honor instruct the witnesses that are here to return tomorrow morning too?

The Court: Yes, give them the instructions.

The Clerk: All the witnesses in the case of Bellamy vs. Southern Pacific Company and Portland Cement Company are directed to return to this court room tomorrow morning at 10 a.m. without

further subpoena. You are now excused until tomorrow at 10 a.m. This jury is now excused.

(Thereupon an adjournment was taken to tomorrow, Thursday, November 3, 1949, at 10 o'clock a.m.) [191]

Morning Session

Thursday, November 3, 1949, at 10 A.M.

The Clerk: Case of Bellamy vs. Southern Pacific Company and Others for further trial.

Mr. Hepperle: Ready for plaintiff, your Honor.

Mr. Bledsoe: Ready.

Mr. Phelps: Ready for the defendant.

The Court: I neglected to ask you gentlemen to stipulate that the Jury is present.

Mr. Hepperle: It is stipulated.

The Court: I assume you will stipulate that they have been present during all of this trial?

Mr. Phelps: Yes, your Honor.

Mr. Bledsoe: Yes, your Honor.

Mr. Phelps: And if you Honor please, we can enter into a stipulation that *unless of* us calls attention to the absence of one, it may be deemed that we have so stipulated in the future.

Mr. Digardi: So stipulated.

Mr. Bledsoe: We agree.

The Court: Very well.

Mr. Hepperle: At this time, with the Court's permission, I should like to file and serve upon counsel two supplemental memoranda.

Mr. Edwards, will you come forward, please?

(Whereupon the previous witness, Frank G. Edwards, resumed the witness stand.)

The Clerk: Frank G. Edwards, heretofore sworn.

Redirect Examination

By Mr. Hepperle:

Q. You have previously testified, Mr. Edwards, that Mr. Bellamy was giving you a signal immediately prior to the accident?

A. That's right.

Q. Will you tell us what that signal was?

A. It is a back-up signal.

Q. Will you stand and demonstrate how that signal was given?

A. This way here (indicating). He was facing the engine, so he would give a signal like this to back away from the position in which he was standing.

Q. Was that a continuous signal or otherwise?

A. It was a continuous signal.

Q. At the time Mr. Bellamy was giving you this continuous signal, who, if anyone, was in charge of the movement of the train? A. He was.

Mr. Phelps: Objected to as immaterial, incompetent and irrelevant and calling for an opinion and conclusion, if your Honor please.

Mr. Hepperle: In respect, your Honor, to the matter of opinion and conclusion, we respectfully submit that the rule of law is that railroad em-

(Testimony of Frank G. Edwards.)

ployees experienced in their occupation are experts, qualified to testify respecting the application of the operating rules of the defendant's particular movements, [193] and that they are likewise qualified as to the custom and practice existing in respect of particular situations. We have several authorities which we will cite if your Honor cares to hear them.

The Court: I don't. I will admit the testimony.

Mr. Hepperle: May we have the reporter repeat the question, your Honor?

(Record read.)

Q. That is, Mr. Bellamy was?

A. That's right.

Q. State whether or not based upon your experience and the rules of the company, it was necessary for Mr. Bellamy to take the position he did immediately prior to the accident.

Mr. Bledsoe: I will object to that, if your Honor please, as calling for an opinion and conclusion as to whether it was necessary. This man is an engine man, and there were a variety of choices available to this man. Maybe this was a proper place and maybe it wasn't. Maybe there were other proper places. But the question of necessity certainly invades the province of the Jury in this particular case.

The Court: I think that is the fact.

Mr. Phelps: We join in the objection.

(Testimony of Frank G. Edwards.)

The Court: I think that that is calling for his conclusion on a matter which the facts introduced will indicate one way or the other; from which the Jury can draw inferences one way [194] or another.

Mr. Hepperle: Very well, your Honor.

Q. (By Mr. Hepperle): Will you state whether or not, Mr. Edwards, the position taken by Mr. Bellamy immediately prior to the accident was a proper one?

Mr. Phelps: Well, that is subject to the same objection, if your Honor please; I think that is for the Jury to determine under the circumstances of this case.

Mr. Hepperle: Again, your Honor, we submit that under the authorities it is a matter of expert testimony. This man is an expert railroad man, familiar with the rules, the custom and practice for many, many years.

Mr. Bledsoe: We want to make the objection, too, if the Court please, that it is calling for an opinion and conclusion of the witness on a matter of fact.

Mr. Hepperle: We are willing at this time, your Honor, since we believe this to be an important matter, to cite the authorities, if your Honor cares to hear them.

The Court: I think I will admit the testimony at this time, subject to a motion to strike, with an admonition to the Jury.

(Testimony of Frank G. Edwards.)

Mr. Phelps: Well, if your Honor please, may I enlarge upon the objection as to the form of the question, and ask that it be confined in this way: That it was a proper place, rather than the proper place—having in mind your Honor's other ruling as to whether it was necessary, or was it the proper place. There may have been several proper places, and I would like to make that objection.

The Court: I think that point is well taken.

Mr. Phelps: Thank you.

The Court: There may have been more than one place where he could have gone.

Mr. Hepperle: Yes, your Honor.

The Court: Change that to "a proper place," and I will allow the question.

Q. (By Mr. Hepperle): Mr. Edwards, will you state whether or not, based upon your experience and the rules of the company, the position taken by Mr. Bellamy immediately prior to the accident, while he was giving you this continuous signal, was a proper position? A. It was.

Q. Counsel asked you with reference to the rules, whether under a certain set of circumstances it was your duty to stop the movement if Mr. Bellamy disappeared from your view. Now going back to the situation as it existed immediately prior to the accident, with Mr. Bellamy giving you a continuous back-up signal, what would have been your duty if Mr. Bellamy had disappeared from your view at that time? [196]

(Testimony of Frank G. Edwards.)

A. Well, with the movement, we had two cars to the rear of the engine and it was necessary for somebody to be in view at all times to see that these cars didn't hit any obstruction on the track behind us while we were backing up.

The Court: Well, that doesn't complete your answer.

Mr. Phelps: I think it does answer your question, just the way it did yesterday.

The Witness: Regarding the signals of the cars behind us——

Mr. Hepperle: May I start at the beginning of the movement, your Honor? I think we can clear the point up.

Q. (By Mr. Hepperle): Now, [199] Mr. Edwards, the movement was out of the Paraffine spur, backing into the main line toward Redwood City, is that correct? A. That's right.

Q. A coupling had been made up here by this shed on the plat, marked Plaintiff's Exhibit 6. After the coupling had been made, you received a back-up signal? A. That's right.

Q. Who did you receive the signal from?

A. Mr. Husson.

Q. Did you receive a further back-up signal from anyone else?

A. It wouldn't be necessary.

Q. That was at the time of the beginning of the movement? A. Yes.

Q. You have also testified that as the engine and

(Testimony of Frank G. Edwards.)

the cars backed out of the switch or backed out of the spur, that Mr. Bellamy dropped off the car and was in the process of giving you a continuous back-up signal? A. That's right.

Mr. Phelps: If your Honor please, I want to object to that and ask that my objection precede the answer, on the ground it is leading and suggestive. Now that isn't exactly what the testimony was, and it was leading and suggestive. I ask the answer go out.

The Court: Well, it has already been testified to, and he hasn't really finished the question. [200]

Mr. Phelps: Well, the question as to the time,—if your Honor please, I think that answer ought to go out.

The Court: All right, I will let that go out and we may proceed with the examination.

Q. (By Mr. Hepperle): At the time Mr. Bellamy was giving you a continuous back-up signal, were you receiving signals from anyone else?

A. He was the only one that my attention was directly upon.

Mr. Hepperle: Yes. You may examine.

Recross-Examination

By Mr. Phelps:

Q. Well, now Mr. Edwards, when you were hedging with words, saying "directly upon," you know perfectly well, Mr. Edwards, that Mr. Lechner was over here and your duty was to look at both men to receive signals, isn't that true?

(Testimony of Frank G. Edwards.)

A. You usually watch the man that is making the movement, that is closest to you.

Q. But you also were over there watching Mr. Lechner, the conductor, weren't you? You were glancing over there? A. Well——

Q. Indeed, that is one of the reasons you weren't looking at Mr. Bellamy continuously; that is what you testified to yesterday? A. That's right.

Q. That's right. And there is no difference over night, is there? [201] A. No.

Q. Since you have talked to the attorneys representing the plaintiff, is there?

A. The man that is usually closest to us is the man that we observe, to watch signals.

Q. But you are watching both of them?

A. Yes.

Q. And when one man goes out of your view, from whom you are receiving your signals, if there is another man that is still in your view, you don't stop; you look around to see if there is another man that can see the man that went out of view, don't you? A. That's right.

Q. So that in this case, if Mr. Bellamy had gone out of view, you could simply look around to see where Lechner was; you knew he was in a position to see Mr. Bellamy, you would look around to see where he is, if he can see Mr. Bellamy, and if he can't see him, you don't stop, do you, as long as there is somebody in view?

(Testimony of Frank G. Edwards.)

A. As long as there is somebody in view, you don't.

Q. That's right. So that you still don't stop, even though Mr. Bellamy had remained in a safe place back here and hadn't gone out and given you a signal, isn't that true? A. Uh-huh.

Q. What is the answer? [202]

A. That's right.

Q. That's right. All right. And as a matter of fact, Mr. Edwards, so far as this position is concerned of Mr. Bellamy, it was his own choice, wasn't it, whether he——

Mr. Digardi: I object to that, if your Honor please.

Mr. Phelps: Well, now, you have gone into this. Let me at least get my question out.

The Court: Let him finish his question.

Mr. Phelps: Mr. Edwards, it was his own choice as to whether or not he should stay where he was or whether he should look around and pass any signals to Mr. Lechner across the road, wasn't it?

A. The man following the engine is usually supposed to keep in sight of the engine during the movement.

Q. But it is his own choice, is it not, to see whether he wants to stay there—you wouldn't have stopped?

A. No, I wouldn't have stopped.

Q. That's right. And it is his own choice as to whether he stayed there or whether he should

(Testimony of Frank G. Edwards.)

look around to see whether there was anyone in sight of the engineer and pass signals to him, isn't that true?

Mr. Hepperle: I object, your Honor. That question has been asked and answered. The witness has stated it was the duty of the man to be out there.

The Court: Well; this is cross-examination. It is proper. [203]

Mr. Phelps: And I believe the witness could answer the question. Mr. Reporter, did you get the answer?

(Record read.)

Q. (By Mr. Phelps): That is true, is it not?

A. The man following the engine usually tries to keep in sight of the engineer at all times.

Q. But it is his own choice in the way he wants to do the work, regardless of what the condition is. If he wants to look around and see if there is another man in sight of the engineer that he can pass signals to, then he would look around to see if there was one and pass his signals to that man. Now wouldn't he do that?

A. The men are allowed to pass signals between each other.

Q. And you know perfectly well that is true, Mr. Edwards, isn't that so?

A. That is why they have more than one or two men on a crew.

(Testimony of Frank G. Edwards.)

Q. That's right. So that it was his own choice as to how he wanted to perform his work on that day. You didn't direct him to go out there, did you? A. No.

Q. And it was a matter for him to decide, wasn't it? A. That's right.

Q. That's right. All right. Well, I suppose you have been talking to the attorneys for the plaintiff over——

Mr. Digardi: I object to that remark, your Honor. [204]

Mr. Phelps: Oh, well, I will withdraw it. Forget it.

The Court: I will ask the Jury to disregard it.

Q. (By Mr. Phelps): Now, then, Mr. Edwards, then so far as the—withdraw that.

I think we have covered that point sufficiently, and there is only one other question I want to go into with you.

There was a picture introduced in evidence yesterday. Now, Mr. Edwards, this is Plaintiff's Exhibit No. 31 which I show you, which shows the locomotive, taken from the side of the locomotive, and you have testified to that picture yesterday?

A. Yes.

Q. As to what it shows. Now, Mr. Edwards, I want you to look at that picture again and tell me whether that is the location of the engine at the time you stopped, or whether it is the location of the engine at the time Mr. Bellamy got off the train.

(Testimony of Frank G. Edwards.)

A. That is just approximately where we were standing when we stopped.

Q. When you stopped? A. Yes.

Q. But not at the time when Mr. Bellamy got off? A. No.

Q. So that he got off a little previous to that. So that if there was any testimony to the contrary to the testimony yesterday, you would be mistaken, if you answered the question in the [205] affirmative that way? I call your attention to that, Mr. Edwards, because I believe, if my notes are correct, that on cross-examination by Mr. Bledsoe you indicated that this was the approximate position of the locomotive at the time that Mr. Bellamy got off, whereas it is my understanding that this is taken with the front end way up to the switch points?

A. We didn't move, the engine was moved a very short distance when he alighted, a very, very short distance he alighted and the time we stopped.

Q. But this would be the position, at a standstill, after the accident?

A. Just about that.

Mr. Phelps: That is all.

Recross-Examination

By Mr. Bledsoe:

Q. Mr. Edwards, when you say it moved a very short distance, how many feet do you estimate?

A. Not more than 15 or 20.

Q. And about how many steps did you see Mr.

(Testimony of Frank G. Edwards.)

Bellamy take, side-stepping or backwards, whichever it was?

A. Well, he moved about 8 feet from the car towards the center of the road, at an angle. Facing me with his back to the traffic.

Q. Now after you stopped your train, did you move it any more before the police officers arrived?

A. No. [206]

Q. In your conversation with Mr. Carlson, the driver of the car, did you go over to him and pat him on the back and state to him, not to worry, that it was not his fault? A. No.

Q. The train crew that was east of you consisted of Quinlan, Husson, Bellamy and Lechner, is that right? A. That's right.

Q. You regard the conductor as a member of the crew? A. Yes.

Q. And was Husson at any time in your view after he gave you the back-up signal?

A. Not when we got around the curve. When we entered the curve he wasn't.

Q. Well, by the time you saw Bellamy step off the train, was Husson in your view at that time?

A. No.

Q. By the time you saw Mr. Carlson's automobile coming, was Husson in view? A. No.

Q. Bellamy was in your view all the time?

A. Yes.

Q. And while Bellamy was in your view riding on the box car, was he giving you any signals then?

(Testimony of Frank G. Edwards.)

A. Not on the car.

Q. Was anyone giving you any signals while Bellamy was on the [207] car? A. No.

Q. Now in backing up from this shed, I see on Plaintiff's Exhibit 7 some kind of a crossing on your train there. A. Uh-huh.

Q. Did your engine go in east far enough to go beyond that crossing of the track?

A. We probably stopped right on the crossing.

Q. Now are there any crossings that cross the track to the west of the switch point?

A. Quite a ways back there is a crossing.

Q. How far?

A. Oh, probably 6 or 8 hundred feet, 6 or 8 hundred feet.

Q. That is the Bay Shore Highway?

A. No, there is one before that that goes into some industry there to the north side of the road.

Q. You were not intending to back that far in this move, were you? A. No.

Q. Now in your statement that was read here yesterday, you mentioned that the truck approaching from the cement plant passed other members of the crew about 100 feet from the point of the accident. Are you referring to Lechner and Quinlan in that statement?

A. Lechner was on the opposite side of the road. The truck [208] must have passed him and Quinlan. The last time I saw Quinlan, he was on the ground alongside of the cars when we pulled out of the siding.

(Testimony of Frank G. Edwards.)

Q. Well, when you refer to the truck passing other members of the crew 100 feet from the point of the accident, you stated in the plural, and I am just wondering if you are meaning Quinlan as well as Lechner.

A. If Quinlan hadn't moved from where I saw him, the truck would have passed him.

Q. You were also asked in this statement how far was the curve that this truck came around from the point where Bellamy was struck, and you answered, "I could see other members of the crew, and we had two cars between the engine and where they were standing, about two car lengths from the point of the engine." Now you are referring there, are you, to Quinlan?

A. I am referring to the conductor at that particular time.

Q. Well, you were talking in the plural?

A. I couldn't see Quinlan.

Q. About "other members of the crew." Now doesn't that refresh your recollection, Mr. Edwards, that you did see Quinlan?

A. No, I didn't see Quinlan, because the curve was too sharp for me to see beyond the edge of the car, as the photographs would show.

Q. You are assuming by that, that Quinlan was on the cars, [209] are you?

A. I don't know where Mr. Quinlan was.

Q. Is Mr. Quinlan here in Court?

A. He is.

(Testimony of Frank G. Edwards.)

Q. And is Mr. Lechner here in Court?

A. Yes, he is.

Q. And Mr. Husson? A. He is.

Q. You were having no difficulty in seeing the conductor where he was standing?

A. As long as there was no traffic moving between the conductor and the cab, I could see him.

Q. You were up pretty high in the air?

A. The cab is ten feet and a half from the ground.

Q. And the movement that you were making there that evening, were you in any hurry to get it made and get it over with? A. None at all.

Q. Had plenty of time?

A. Plenty of time.

Q. Now there is one other thing. You illustrated a back-up signal that Bellamy was giving. Would you illustrate that again for me?

A. Well, the man is facing the engineer, he moves his arms from this position. That moves—that means to move away from where he was standing (indicating). [210]

Q. I see. Now if he has his back to you, how would he indicate to you to move still backing up?

A. With his back—you mean?

Q. Yes.

A. You will be the engineer and I will be the brakeman?

Q. Yes.

A. He would go like this here (indicating).

(Testimony of Frank G. Edwards.)

Q. I see.

A. "Back away from me."

Mr. Bledsoe: That is all. Thank you.

Further Redirect Examination

By Mr. Hepperle:

Q. Mr. Phelps examined you and asked you whether it was Mr. Bellamy's choice to be where he was immediately prior to the accident. State whether or not it was his duty to be there.

Mr. Phelps: I will object to that as calling for his opinion and conclusion. It has been answered as to his choice.

Mr. Bledsoe: I will join in that objection.

Mr. Phelps: We are getting into that same thing, if your Honor please, that they are trying to bring out whether it was necessary. And that is for the Jury to decide, all this evidence.

Mr. Hepperle: Mr. Phelps has gone into the matter fully, your Honor; Mr. Phelps seems to be of the opinion it is all right for him to ask for an opinion and conclusion. We should let the *man is* an expert railroad man and is fully qualified and is entitled under the law to answer the question.

Mr. Phelps: My position, your Honor, so there will be no misunderstanding, is that it is simply this—that he was allowed to ask if it was a proper position. Now if that is one of the places that he could have gone under his duties, I have no objection. My thought is that we can't confine it to be that that is his duty to be only at that particular

(Testimony of Frank G. Edwards.)

place, and I think that my position has been consistent.

The Court: Of course the answer in the affirmative, to the effect that his duty was to be there, would be inconsistent with the witness' statement that he previously made, that he had the choice of being there.

Mr. Hepperle: Well, of course, your Honor, he had a choice to violate the rules.

Mr. Phelps: Well, I don't think that there has been any evidence that he—well, go ahead.

The Court: I will permit the question.

Mr. Bledsoe: Do I understand the question, Counsel, to mean that now you are asking him to interpret whether the man was complying with the rules?

The Court: Yes, he has been asked whether or not under his duty as a switchman at the particular time and under the particular circumstances then existant, it was his duty to be there, to go out in the roadway, where he was, to pass signals. That is as I understand the question. [212]

Mr. Hepperle: Yes, your Honor.

Mr. Bledsoe: Well, we will join in the objection, if your Honor please.

Mr. Phelps: We made the objection that that is the precise thing the Jury is to determine, if your Honor please, in that form. I have no objection if it were modified to meet the objection I have made, that he might be out there under his duties,

(Testimony of Frank G. Edwards.)

or might not. But you are getting in that question by its form, something which if answered in the affirmative, would mean that that would be the only place he could be. And I don't think that that is proper, particularly under the state of this evidence.

The Court: The witness on the witness stand is the engineer of the train, he has been operating trains for a number of years, he knows or should know, what generally would be the position to be taken by his brakeman under similar circumstances. I will let him answer that.

Mr. Hepperle: Do you remember the question, Mr. Witness?

A. Was it Mr. Bellamy's place?

Q. I will rephrase or restate it, if I may. Will you state whether or not in the particular circumstances that day, in the particular movement, it was Mr. Bellamy's duty to be in the position he took immediately prior to the accident?

Mr. Phelps: Well, the same objection, and particularly in the form it is now put, because it would modify the question, if [213] your Honor pleases.

Mr. Bledsoe: We join in the objection.

The Court: Go ahead, answer it.

A. There was nothing unusual in Mr. Bellamy's position.

Q. Will you state whether or not it was also the custom and practice of the head brakeman to be in your view at all times?

(Testimony of Frank G. Edwards.)

A. The head brakeman tries to keep in view of the engineer at all times.

Mr. Hepperle: That is all.

Further Recross-Examination

By Mr. Phelps:

Q. But of course the head brakeman is not required to be in your view at all times, is he?

A. There's times when he can not be in the view of the engineer.

Q. Why of course. And so again, as long as there is one man in view, that is all that is necessary. All right. Now then, one other thing. The conductor, is he not, is the man in charge of this movement? He is in charge of the train?

Mr. Phelps: Beg your pardon, your Honor. I think that question is compound. I wish it rephrased as to whether the conductor was in charge of the train or of the movement.

Mr. Phelps: I will rephrase it.

Q. The conductor is in charge of the crew, isn't he?

A. The conductor is in charge of the crew.

Q. That's right. And the conductor, he is giving signals in [214] a position to see, he is in charge of the movement, isn't he?

A. The conductor has a tag man working under him that usually does the switching moves.

Q. Yes, but the tag man in this case was Mr. Husson, wasn't he? A. Yes.

(Testimony of Frank G. Edwards.)

Q. And the tag man is the man that carries the switch list? A. That's right.

Q. So far as the conductor is concerned, and in this move particularly, where he had got cars ahead of the engine in your direction of movement and cars behind your engine in the direction of movement, and where there is nobody out on the point riding out here at the head end of your train in the direction of movement, and where your conductor is the only one who can see the head end of those cars, your conductor is the man from whom you should take your signals and in charge of that movement, isn't that correct?

A. Any member that is in view that has either end of the train in view is the man who I would take the signal from.

Q. You bet your sweet life. You bet. And you would take the signals from a man you were in charge of on that particular move, for the safety of everyone, and that is the man that can see the front end of your train as well as the rear end, isn't that true? A. Yes.

Q. So now isn't it a fact, then, on this very move where the [215] conductor was the only man that could see the front end of your train when you were moving——

Mr. Digardi: I object to that, your Honor, because there is no evidence that Mr. Bellamy could not see the front end of the train. He is assuming facts not in evidence.

(Testimony of Frank G. Edwards.)

The Court: Let him finish the question and then I will sustain the objection.

Mr. Phelps: All right, well, I will still make the question, because I think it is proper and I think the facts will speak for themselves. All right, your Honor—with deference if I may.

The Court: You are assuming in your question that the conductor was the only man that could see the other end, the west end of that train.

Mr. Phelps: In the position he was in; yes, your Honor.

The Court: The position he was in. Now there is no evidence that Bellamy couldn't see it. The witness has just stated that he took signals from either party that could see it.

Mr. Phelps: Took signals from either party that could see it.

The Witness: That's right.

Mr. Phelps: But when a man—well, I will withdraw it and put it this way to you.

Q. When you saw Mr. Lechner station himself across the highway, you knew that one of his purposes in stationing himself over there was so that he could [216] see both ends of your cut, didn't you? A. That's right.

Mr. Digardi: One moment please. I object to that as calling for the opinion of this witness as to what the conductor had in mind at the time. I don't think this witness knows what was in the conductor's mind at that time. He might get that from the conductor.

(Testimony of Frank G. Edwards.)

The Court: Well, I will allow it; the conductor is here.

Mr. Phelps: You can bring it out from the conductor if you wish.

Q. (By Mr. Phelps): Now then, in that position you did know this, though, that across the road he was in a position to see the front end of your cut as well as your rear end, of your cut?

A. He could see the complete movement.

Q. That's right. And a man in that position, outside of your curve like that, where he could see both ends of the move, is the man in charge of the movement, is he not?

A. He is in charge of the whole crew, the whole movement, and everything.

Q. And the whole movement, is he not, that particular movement? A. Yes.

Q. All right. Now then, one other thing that we haven't gone into. These tracks cross Bay Shore Highway west of there? A. Yes.

Q. About how far? [217]

A. 800 to a 1000 feet.

Q. Now just west of Bay Shore Highway the tracks continue down and along Chestnut Street, do they not, in Redwood City?

A. I am not familiar with the name of the street, but they continue toward Redwood City.

Q. They do continue on a street, on a paved street? A. Straight track, yes.

(Testimony of Frank G. Edwards.)

Q. And right in the street itself, aren't they?

A. Yes.

Q. For some considerable distance, the very track you had been on?

A. Probably three-quarters of a mile.

Mr. Phelps: I have no further questions.

Mr. Hepperle: That is all.

Mr. Bledsoe: That is all, your Honor.

(Witness excused.)

Mr. Hepperle: Mr. Lechner, will you come forward, please?

GEORGE P. LECHNER

called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name, sir?

A. George P. Lechner, L-e-c-h-n-e-r.

Direct Examination

By Mr. Hepperle:

Q. Where do you live, Mr. Lechner?

A. 1228 McAllister Street, San Francisco, California.

Q. And who do you work for? [218]

A. Southern Pacific Company, Coast Division.

Q. And how long have you worked for the Southern Pacific Company?

A. Fourteen years.

Q. And what is your position at the present time?

A. Conductor.

Q. When were you promoted to the position of conductor?

A. May, 1942.

(Testimony of George P. Lechner.)

Q. And what was your position before that?

A. As freight brakeman.

Q. What has been your experience in the 14 years or so that you have worked with the Southern Pacific, in what type of service?

A. Well, practically all of it has been as a brakeman and conductor in local freight service. Generally in freight service.

Q. Directing your attention to April 4, 1949, were you the conductor in charge of a crew on that day? A. Yes.

Q. And who were the members of your crew?

A. Engineer Edwards, Brakeman Quinlan, Bellamy and Husson. I can't remember the fireman's name right now.

Q. And at about 5:30 p.m. on that day, where were you working?

A. We were working on the plant, the old plant spur, and—well, it is the Pabco Company. They have both spurs now. There was a new spur above the one here, and we were working at the [219] old plant spur. That is where the asbestos siding is, where the asbestos is made by the Pabco Products Company.

Q. Was there a movement to be made out of the spur running into the Paraffine plant, or the asbestos plant?

A. Well, yes; I don't think the move has been clearly explained to the Court yet, that we were involved in on that day.

(Testimony of George P. Lechner.)

Q. Well, you tell us what the move was.

A. Well, when we left Redwood City, I have to go back at that, we had approximately 20 cars on the train and the information for the switch movements of all these industrial spurs between Redwood City and Redwood Harbor are furnished us at Redwood City. That is, we are given a switch list of the work to be done, and according to the list this day, we had two cars listed for the Pabco Products Company and two cars for the old plant spur. And as we arrived at Bay Shore Highway, I instructed the brakemen to leave the train back of the highway crossing, because of the number of cars we had, and cut off the two cars next to the engine. And we had one car ahead of the engine. Because the information that we were furnished, the car ahead of the engine was to go into the old plant spur and the two cars behind the engine were to go down the Pabco Products spur. And after we arrived at this point, we went up the main line, because the information, according to the list, was that the car that was spotted first out at this shed on the plant spur was to be a load. That load was to be pulled out and an empty spotted in [220] its place, which we had ahead of our engine. So we went up the main line and stopped, because when we arrived there, I could see that they still had the skids in the car. That is, it didn't look that it was loaded. So I dropped off and went over and talked to the foreman at the shed. Mr. Husson was with me. When I got there,

(Testimony of George P. Lechner.)

he said, no, they hadn't made the load yet, it wouldn't be ready until about 5 o'clock. Then he told us that the car that they gave us ahead of the engine was the wrong capacity for the type of load that he wanted to put in it, but the cars we had behind the engine were the right capacity, so that it necessitated us reversing the movement, the cars. So I told Mr. Husson, then, that he had better pull the cars out of the spur and shove them up the Harbor main line and then drop the cars that we had behind us into the spur, and replacing the baby load, or part load, at door one, so as it could be picked off as we came back from the Harbor and the other cars pulled down to spot. So then we went out and they gave a back-up sign to the engineer, Mr. Edwards, and they headed in on the plant spur with Mr. Bellamy riding—who threw the car in on the switch, and rode the car in and made the coupling, and I stepped across the highway where I could see the movement in all directions, as we had cars on both sides of the engine; and I could check the numbers of the car as they were pulled out of the spur. And then when they started out of the spur, was when the accident happened. [221]

Q. Directing your attention to the plat here marked Plaintiff's Exhibit 6, can you come down here and give us approximately your position, that you took, across the highway?

A. Well, you have a picture there, I think it shows very clearly. I could show you where I was

(Testimony of George P. Lechner.)

standing. I would rather tie that up with the map. This picture will show it.

Q. I show you Plaintiff's Exhibits 13, 16 and 39 and ask you if you are able to find the position you took across the highway in the pictures.

A. Well, this picture—there was a pile of refuse across the road, right by that pole there (indicating).

Q. One moment. This is Plaintiff's Exhibit No. 39. You have pointed to a pile of refuse.

A. I was standing right on that pile of refuse by this pole. That is a driveway right here, too. This is the driveway (indicating). It is right about opposite the end of the shed, and this little crossing here, the first crossing inside.

Q. I will mark that with an arrow.

Mr. Hepperle: I will mark an arrow, if I may, your Honor, on Plaintiff's Exhibit 39, indicating the position Conductor Lechner was standing in across the road (marking). I will mark that "Conductor Lechner" if I may.

A. (Continuing): Yes, this is the same one. You can just see the corner of it there (indicating).

Mr. Hepperle: I will do likewise in respect to Plaintiff's [222] Exhibit No. 16 (marking).

Q. In respect to Plaintiff's Exhibit No. 13, can you also see the position you took in that photograph?

A. Well, this is taken quite a ways back. I would say it was there (indicating). No, that is—Well,

(Testimony of George P. Lechner.)

that looks like this same pole here, though, doesn't it. Well, it was right in that vicinity, because it is taken from a different view, this picture.

Q. You are unable to state positively in respect to Plaintiff's Exhibit 13?

A. Well, on this particular one I am, because it shows—well, I would say it was right about there (indicating). That is as close as I can place it on this picture, the last picture.

Q. Now having seen the photographs, are you able to estimate upon the plat, Plaintiff's Exhibit 6, as to your position across the highway?

A. Which is 6, this one? It was right about the vicinity of this pole, I believe (indicating). It may have been a little bit either way.

Q. Will you point to the approximate position?

A. Was this B-3 a crossing that you put in there?

Q. No, that is another indication.

A. Well, there was a crossing here. You can see in this picture. And I was directly opposite that first crossing.

Q. Will you give your best estimate as to the point on the [223] plat, Plaintiff's Exhibit 6, of your position?

A. Well, I would say about in here (indicating).

Q. (By Mr. Hepperle): With your Honor's permission, I will mark a cross and write "Conductor Lechner" (marking).

(Testimony of George P. Lechner.)

A. (Continuing): I am not very much of a map reader (resuming witness stand).

The Court: It is about 11 o'clock now. I think we will take the morning recess for about 10 minutes. In the meantime, during the recess, ladies and gentlemen, bear in mind the admonition which the Court has heretofore given you.

(Brief recess.)

Q. (By Mr. Hepperle): Had you given any instructions, Mr. Lechner, to the crew as to which side of the train they were to work on or to pass signals on?

Mr. Phelps: Objected to as hearsay, if your Honor please.

The Court: Overruled.

A. Yes.

Q. (By Mr. Hepperle): Which, if any side, had you given them instructions to pass signals upon?

A. Well, when we went to work that day,—

Q. Excuse me. I think we can save a little time. In respect to this particular movement, backing out of the Paraffine spur, had you given any instructions relating to that movement as to which side signals were to be passed upon?

A. Well, I told Mr. Husson, who was the tag man, or list man [224] that day, that whenever practicable, to work on the engineer's side.

Q. Now as I understand it, the engine, with some

(Testimony of George P. Lechner.)

cars, went into the spur to make a coupling, is that correct? A. That's correct.

Q. How many cars did the engine have behind it? A. Well, we should have had two.

Q. And how many cars did the engine have ahead of it as it went into the spur? A. One.

Q. Was the coupling made? A. Yes.

Q. Did the engine and the cars attached start to back out of the spur? A. Yes.

Q. How many cars were attached to the head of the engine at that time?

A. Well, as I recall it, three.

Q. Now at the time that the backup movement out of the spur began, can you tell us where brakeman Husson was?

A. Well, he checked the numbers of the cars.

Q. No, can you just tell us where he was at the time?

A. On the ground, back by the second spot on the shed.

Q. Does that show on this plat marked Plaintiff's Exhibit 6? A. No, it doesn't. [225]

Q. Can you tell us where he would have been in relation to this plant?

A. Well, that number 6 isn't a good picture—it is all right as far as the switch is concerned, but it doesn't show the shed, and the curve is sharper than that.

Q. No, just in relation to Mr. Husson.

(Testimony of George P. Lechner.)

A. Well, he was clear behind the shed, way in the back.

Q. You mean over this way (indicating)?

A. Yes, sir.

Q. Running off the edge of the plat?

A. Yes, sir. There was two spots in that shed, and as the second one wouldn't show—

Mr. Hepperle: I will mark that, if I may, to the east (marking).

Q. Now so that we may have it clearly in mind as to the positions of the various members of the crew, and the backward movement was made, I wish to draw roughly on the board an engine with three boxcars ahead of it and two boxcars behind it (drawing diagram). It is a very roughly drawn diagram. Do you understand it? A. Yes, sir.

Q. As the backup movement began, were you able to see Mr. Quinlan? A. Yes, sir.

Q. Where was he? [226]

A. He was on the brake platform of the third car facing the direction of the engine. That is, on the top of the car, the brake platform.

Q. Are you—will you come down here and indicate his position, please?

A. Well, as I recall him, he was here (indicating). This would be the brake platform.

Q. Will you mark where the brake platform would be?

A. He would be facing the direction of the engine (marking).

(Testimony of George P. Lechner.)

Mr. Hépperle: I will also mark, if I may, your Honor, the direction of movement (indicating).

Q. Now where was Mr. Bellamy?

A. Mr. Bellamy was right here (indicating), on the short ladder next to the pilot, right here, riding on the side of the car.

Q. And the engineer and the fireman?

A. Well, the engineer was on this side of the engine in the cab, the fireman directly opposite him.

Q. As you have already indicated, Mr. Husson would be directly down off the edge of the board?

A. He was back there, clear in behind (indicating).

Q. Now as the backing movement out of the spur began, what, if anything, were you doing?

A. Well, I was across the highway with the copy of my train book. That is, my record book. And the switch list, I had [227] that in my hand, to check the numbers of these cars as they were pulled out of the spur, to be sure that Mr. Husson had come out with the proper car.

Q. How far—how fast was the movement going at that time?

A. Well, the movement had just started. I would say it wasn't over five miles an hour.

Q. As the movement continued, did it ever go over four miles an hour? A. No.

Q. What were the conditions with respect to visibility at that time?

A. Very good. You mean weather conditions, don't you. Or——?

(Testimony of George P. Lechner.)

Q. In respect to visibility, were you able to see?

A. Yes, yes.

Q. Now, directing your attention to a period immediately before the accident, just before the accident took place, where, if anywhere, were you looking?

A. Oh, I was watching Mr. Husson and watching the cars as they came out, more than anything else, because I had to verify these numbers.

Q. Did anything pass your range of vision as you were looking at Mr. Husson and the cars?

A. Well, this pickup truck came between my range of vision and the cars.

Q. Did you estimate its speed? [228]

A. Well, it went through there pretty rapidly. I would say between 30 and 35 miles an hour.

Mr. Phelps: Move to strike his characterization of it other than the statement of miles per hour.

Mr. Hepperle: That may go out, your Honor.

The Court: Yes, "pretty rapidly" may go out. The rest of it may stay in.

Mr. Hepperle: After the truck passed your range of vision, what happened next?

A. Well—

Q. Did you hear anything?

A. I heard a thud and then a squealing of brakes or skidding of tires on the pavement.

Q. What did you then do?

A. Well, I spun around, and this was to my back. I was facing in the opposite direction. And

(Testimony of George P. Lechner.)

I saw Mr. Bellamy sort of reeling around in the highway.

Q. Did you go to him?

A. Yes, immediately.

Q. Did you make arrangements for an ambulance?

A. Well, yes. I found Mr. Bellamy with his arm open and bleeding very badly, and he was apparently suffering from shock. So I directed he be made comfortable and a tourniquet applied, and then I went to call an ambulance.

Q. Who, if anyone, applied the tourniquet? [229]

A. Brakeman Husson told me he was familiar with first aid, so I said, "You go ahead and put a tourniquet on the arm."

Q. Did you see Mr. Bellamy just before the accident happened?

A. Well, I saw him as I pulled out of the spur. He was on the short ladder next to the pilot and the engine.

Q. Was the last time you saw him when he was riding on the short ladder? A. Yes, sir.

Q. Was the bell ringing at the time of the movement? A. I am sure it was, yes, sir.

Q. What kind of a bell sound was it?

A. Well, it is an old type steam engine, and it just had the regular ding-dong bell. It wasn't an electric bell.

Q. Did you hear the evidence of Mr. Bellamy as to where he was immediately before the accident?

(Testimony of George P. Lechner.)

Mr. Bledsoe: Objected to as incompetent, irrelevant and immaterial.

The Court: I think I will sustain that objection.

Q. (By Mr. Hepperle): Will you tell us what Mr. Bellamy's duty was as this movement was being made?

A. Well, Mr. Bellamy was the head brakeman on the crew. His duty was to ride out and dismount from the car and throw the switch for the movement up the harbor main, and his duty is to be in his proper position, as head brakeman, next to the engine. [230]

Q. And what is that position? Can you give us in more detail what it is, what is his proper position? A. Well,—

Mr. Phelps: Well, I'll—never mind, go ahead.

A. (Continuing): When you are switching, in switching movements or any movement, the brakeman is the eyes for the engineer. That is, they have to so distribute themselves so that they can convey signs to the engineer.

Q. On this particular move right here, on this track, with this curve and that situation in mind, what was Mr. Bellamy's duty?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, calling for an opinion and conclusion, if it is limited to one specific thing—it is "the duty." I mean, if he wants to give all his duties, I have no objection.

The Court: Well, that is the question. What were his duties at that particular time?

(Testimony of George P. Lechner.)

Mr. Phelps: If it is purely that, I have no particular objection. I didn't hear it that way, your Honor.

Q. (By Mr. Hepperle): Will you tell us what his duties were at that particular point in those circumstances? A. Well,—

Q. Did he have any duty beyond that of throwing the switch?

A. Well, I have to—I can answer the question, but I have to refer back to the testimony and it has been objected to. [231] Is that right?

The Court: Well, can't you answer the question and then explain it?

A. Yes, he had other duties.

Q. What were they?

A. Well, if he didn't know where I was located, then his duty was to remain in sight of the engineer.

Mr. Phelps: Well, I will object to that, "if he didn't know," and ask that go out.

Mr. Hepperle: Well, I think it is perfectly proper, your Honor.

The Court: I think I will allow it.

Q. (By Mr. Hepperle): Did he have any duty in respect of watching the end of the cut of cars as the movement was made?

A. Well, yes, sir. He might receive a stop signal at any time.

Mr. Phelps: By the way, just for the record, which end?

The Witness: I am assuming you mean the cut.

(Testimony of George P. Lechner.)

Mr. Phelps: The eastward end, thank you.

Q. (By Mr. Hepperle): Did he have any duty with respect to watching the west end?

A. No, I would say not. It is up to me to protect that as the conductor, if they moved over that crossing.

Q. Assuming Mr. Bellamy did not know where you were, whose duty would it be to watch the west end of the cut?

Mr. Phelps: Object to that as hypothetical and asked [232] and answered. He has already given that.

Mr. Digardi: That particular question has not been asked and answered, and it definitely is hypothetical and this man is an expert witness and the cases hold that he is entitled to an opinion.

The Court: I will allow the question.

A. Let me get this straight now. The west end. You mean the cars that were to the rear of the engine?

Q. That's right, the west end, in this direction (indicating).

A. Assuming that Mr. Bellamy didn't know where I was?

Q. Yes.

A. Well, then, he would have to step out and see if there was anybody on the crossing.

The Court: Well, let me ask you something:

Q. Suppose a child ran out on that track on the west end, 10 or 15 yards from where that car was

(Testimony of George P. Lechner.)

moving, and you were on the road where you were and he was where he was; whose duty would it be to signal the train to stop? A. My duty.

Q. Your duty?

A. I was across the highway where I could see the movement in both directions.

Q. Let's assume that he didn't know where you were. A. Then it would be his duty.

The Court: All right. [233]

Mr. Hepperle: You may cross-examine.

Cross-Examination

By Mr. Phelps:

Q. It is also, Mr. Lechner, of course, the duty of brakemen in a movement like that, as he is riding out, and before he drops off, he has to know while he is still in a position and on that curve, and can't see the head end of his cars—he knows then if that movement is being conducted properly, that the engineer wouldn't have started that movement, couldn't start that movement, unless he knows there is a man in position where he can see the front end of that car, isn't that true?

A. That was a long question.

Q. All right, Mr. Lechner. Here is the point: While Mr. Bellamy is still riding on those cars, and before he has dropped off, you are on a curve, he can't then see the front end of that cut, can he?

A. No, sir.

Q. So that in ordinary railroad custom and practice he must know that if the engineer is doing his

(Testimony of George P. Lechner.)

job, that there is a man in position that can see the front end of that cut, doesn't he?

A. Well, he would have a right to assume so.

Q. Certainly he would assume that, and that would be the ordinary custom and practice, isn't that true? And that man was you, in this case?

A. Yes, sir, I was. [234]

Q. You were in the position to see that?

A. That is why I was over there, so I could see the movement all the way.

Q. And so far as Mr. Bellamy's duties were concerned, as he is riding out on that cut of cars, knowing that there must be somebody in position to see that front end, it is his duty to look and see where that man is, isn't that true, so that he can pass signals to him?

A. You are speaking with reference to myself, now?

Q. Yes.

A. Well, he should know where every member of the crew, everyone should know that.

Q. And it is Mr. Bellamy's duty as a good railroad man to know where you are on that move before he drops off that train?

A. Well, I don't like to say that, because I don't want to say whether he is a good railroad man or not. Now you are trying——

Q. All right. I will withdraw the question and we will put it a different way, then. If you don't want to express an opinion on that, let's put it this

(Testimony of George P. Lechner.)

way, Mr. Lechner: So far as ordinary custom and practice is concerned, on a move like that, with Mr. Bellamy riding on the side of the cars, on the outside of a curve where he can't see the front end of his cut, in other words, he can't see the point, it is his duty to know where the man is that can see the front end of the cut, [235] isn't it?

A. Well, I guess it would be his duty, yes.

Q. Certainly it would be. So that there was no reason in the world for Mr. Bellamy, when he got off that cut, to assume that there wasn't somebody that could see the front end and that the front end wasn't protected?

A. Well, I don't know what he assumed. I can't testify as to that.

Q. All right. But you know what ordinary custom and practice is, and you have already testified to that.

A. I know what I would have done, but I wasn't the man involved.

Q. All right. Now, then, you were, of course, in a position where you could watch both ends of that cut?

A. Yes, sir, and all members of the crew.

Q. And you were performing your duties in that respect?

A. I believe I was, to the best of my ability, yes, sir.

Q. So that you were the man to whom signals could be passed by any of the members of the crew behind, is that true?

(Testimony of George P. Lechner.)

A. Oh, yes, behind.

Q. Yes. Mr. Bellamy, in his position, where he dropped off on the main line tracks, could have passed signals to you if he had wanted to?

A. Yes, sir.

Q. And those would have been relayed in turn to the engineer, would they not? [236]

A. They would, provided the engineer was watching me.

Q. All right. But that is part of his duty, to watch you, when he is taking signals from you, isn't it, as well as the other men, if he can see them?

A. Well, that is true; but, Mr. Phelps, in a movement of this kind, I had designated to Mr. Husson the movement to be made.

Q. I understand that.

A. That makes Mr. Husson, then,—he directs that particular switching movement. I am there in a position where I can give a sign from any member of the crew, but as far as myself directing that particular switching movement is concerned, I was not doing so. Mr. Husson was.

Q. I understand what you are trying to say is that Mr. Husson—

A. He is the tag man.

Q. He is the tag man? A. Yes, sir.

Q. He is the man that goes in there and sees what cars are to be pulled?

A. That's right.

Q. He is the man that, when he is satisfied him-

(Testimony of George P. Lechner.)

self that he has got the right car to pull, he has got to tag, he has compared them?

A. He is, and he and I are the only two that have them.

Q. May I finish? [237] A. Excuse me.

Q. Having satisfied himself that those are the proper cars, he is the man that then gives the signal to go out? A. That's right.

Q. All right. But once that move is under way, in the position you are in, you are the man that is protecting the move, you are the man they should look to to pass signals to?

A. Well, the next man that would give a signal, other than a stop sign, would have been Mr. Bellamy, when he stopped them to throw the switch.

Q. When he stopped them to throw the switch?

A. Yes.

Q. Yes?

A. The only signal I would give——

Mr. Digardi: One moment. Let the witness answer the question.

A. (Continuing): The only signal I would give, Mr. Phelps, would have been a stop sign, had something else occurred, such as a car jumped the track or an automobile going across the crossing. We could have a derailment at any time in a switching operation. That is why I placed myself in a position where I can stop the movement if anything happens.

Q. That's right. But I understand also that be-

(Testimony of George P. Lechner.)

ing in that position, you were also in a position to take a signal from any man out of sight of the engineer? [238] A. That's right, yes, sir.

Q. And you men do that all the time in railroad practice? That's correct, isn't it?

A. Well, it is our duty to be in a position where we can pass signals to each other at any time.

Q. So long as one man is in view of the engineer, that is sufficient, isn't it? A. Yes, sir.

Q. And only one man need be in view of the engineer; that is sufficient, isn't it?

A. He must have one man in view at all times.

Q. All right. Now then, you have placed yourself down here on the map (indicating).

A. I am not very good at maps and that map is not clear to me, so it might not be exactly right where I was.

Q. You didn't see Mr. Bellamy drop off the cars?

A. No, sir, I had no knowledge he had dropped off until the accident occurred.

Q. So then you don't know what point he dropped off? A. No, I don't, sir.

Q. Whether it was opposite you or not?

A. Well, it must have been after he had passed me, or if he had dropped off in front of me, I would probably have noticed it.

Q. Unless the truck had obscured your vision between. Now when the engine was stopped after the accident, where was the front [239] end of the

(Testimony of George P. Lechner.)

engine, do you remember that? If you do, say so. If you don't, tell me.

A. Well, I would place it approximately on the switch.

Q. The front end was still on the switch with part of it in to the spur?

A. Well, no, I think the engine was practically all out on the harbor main, but the cars were still on the spur.

Q. I see. The cars were still on the spur. Now you have given a number of railroad terms. I think we ought to straighten out those. When you first gave your explanation, I am sure there was some things in there that probably somebody didn't follow. In the first place, you said you intended to make a "drop." What is a "drop" movement?

A. A drop is a running switch. That is, when you have cars behind the engine that you need to get ahead of the engine, and there is only two tracks, you start the cars and the engine goes down one track, the brakeman throws the switch and the cars go over to the other track, and then you back the engine up and pick the cars up. That takes them from the rear of the engine to the head of the engine, so that then you have the cars behind the engine that you want to put on the track. We had two.

Mr. Hepperle: I suggest, your Honor, that this is all immaterial, the drop movement would have nothing to do with this accident. [240]

(Testimony of George P. Lechner.)

The Court: Well, it is explanatory. It can't hurt anybody. I didn't understand it.

The Witness: I am sorry. The terms are thoroughly familiar to us, but I don't realize other people don't know them.

Mr. Phelps: He used it; I wanted to have it understood. The reason I did point it out, and the reason it is material, Mr. Hepperle, is this: that in making a drop movement, as I understand it, you would first have to go down this track so as to spot your cars in the clear quite a little ways.

Q. Is that correct?

A. To leave sufficient room for the engine, yes, sir.

Q. And then when you make your drop movement, your drop movement is by going forward, then you slow down just a little bit to take up the slack, the pinpuller pulls the pin, and then you speed up and the engine keeps on going down this track? A. Yes, sir.

Q. And then your cars—then the switch is thrown and the cars which are then following go into the other track?

A. They roll by you into the spur.

Q. Now, as Mr. Hepperle pointed out, you never got around to that drop movement, so that that wasn't involved in the accident?

A. After the accident we did, but not prior to the accident. [241]

Q. Yes, all right. And you think you had, as

(Testimony of George P. Lechner.)

you were coming out of the spur, three cars, is that right?

A. Well, as near as I can recall now, yes, sir.

Q. That is, ahead of the engine?

A. Yes, sir.

Q. Those were all standard boxcars, were they?

A. No, I believe the two on the spur were automobile or furniture cars. They were larger capacity cars for loading. Boxcars have a smaller capacity.

Q. Well, did they want a larger car—were there larger cars behind your engine that they wanted?

A. Yes, sir, larger capacity cars.

Q. Yes. So that the cars you were pulling out and the car that you went in with, the car that you went in with was the ordinary type car?

A. Yes, sir.

Q. All right. A. Standard boxcar.

Q. And that would be the car that you were coupled on to at the time of the accident. Now so far as the standard cars are concerned, do you know what the width of an ordinary boxcar is? The widths are all standard, at any rate, aren't they?

A. Well, there are some cars that are designated over-width, but all Southern Pacific cars and all Class A railroad cars are standard cars. [242]

Q. All right. And do you know what the average width is?

A. Well, forty foot six inch side measurement, usually, and eight foot nine or nine foot two.

Q. As a matter of fact, isn't the width over the

(Testimony of George P. Lechner.)

side sills now? Do you know what the side sills are on a car?

A. No, I don't know all that. There's various cubic capacity too. I know they are designated on the list.

Q. Well, if you don't know, we can establish it another way. I thought maybe you in your experience as a railroad man would know. I will ask you if this does refresh your recollection, that the width over the side sills——

A. That is exterior width, yes.

Q. That is the exterior width. And at the point where the ladders are.

A. Uh-huh.

Q. That is the widest part, is nine feet nine and five-eighths inches, is that right?

A. That is approximately correct. We are more concerned with interior measurements for cubic capacity in spotting cars.

Q. All right. And one other thing. Do you know what the standard gauge is, Mr. Lechner?

A. Four foot eight and a half inches.

Mr. Phelps: That's correct. That's all.

Cross-Examination

By Mr. Bledsoe:

Q. Did you have some switch lists, you [243] say, that you worked with there?

A. They were furnished us at Redwood Junction, yes, sir.

Q. And you would have a record, would you not,

(Testimony of George P. Lechner.)

of how many cars you had in that switching movement in there?

A. I had at the time, but I don't have the list any more, sir.

Q. Well, there is such a record kept, is there?

A. There is a copy on file, should be on file, at Redwood Junction or Redwood City.

Q. And that shows exactly how many boxcars and even the number of boxcars; is that correct?

A. Oh, I wouldn't say that, no, sir, because we had to switch these cars and then it is up to us to furnish the shipper the car that he desires, the same as we would do with the Pacific Portland Cement Company. We might have 15 cars for them, but there's only six that we would spot that day. I mean, they are not furnished by numbers or exact numbers or anything.

Q. Well, wouldn't you keep a record of how many cars you had in your train after you went across on the east side of the Bayshore Highway?

A. No, sir, not on a switching movement. Main line movement, we keep a record of all cars handled in our train.

Q. And that switch list wouldn't show it?

A. The switch list would show approximately; it would show the cars we had at Redwood City for the harbor, and the only other thing it wouldn't show was cars we had picked up en route. [244]

Q. Now did I understand you to say on direct examination that you dropped two cars off west of the Bayshore Highway?

(Testimony of George P. Lechner.)

A. No, we left our train west of the Bayshore.

Q. Left your whole train there?

A. And cut off two cars and came down to this industry spur.

Q. In other words, you took two cars when you went down to the spur?

A. We had three cars, one ahead of the engine and two behind, as I recall it.

Q. This is just from your recollection, is it?

A. That's right, sir; I have no records with me.

Q. Had you been into this plant where you were going to spot the cars before you went down with the three cars, with your engine?

A. No, we first went down the harbor main and stopped opposite the shed, and Mr. Husson and I walked over and conversed with the foreman, because we could see the car wasn't loaded, the skids was still in the first car, which was listed as a load.

The Court: By "skid" you mean the——

The Witness: Loading platform.

The Court: Loading platform. A freight loading platform into the car?

The Witness: Yes, sir.

Q. (By Mr. Bledsoe): You went down this main line here (indicating)? [245]

A. That's right, sir.

Q. To a point opposite the shed. Now how did you get there? Did you go with your train or did you walk?

A. No, no, we went down with the engine and

(Testimony of George P. Lechner.)

the three cars, one ahead of the engine and two behind.

Q. And what did you have the two behind for at that time?

A. They were to go up on the Pabco spur. That is, the new spur.

Q. Where is that located?

A. Just beyond the old plant shed. It is about—it doesn't show in that diagram, but it would be another——

Q. East of here?

A. Yes, sir, about, oh, a quarter of a mile involved there, I guess.

Q. And those two cars had already been selected for that plant, had they, by previous orders of the plant?

A. Well, they were listed to go to that plant, the Pabco plant.

Q. Was there any particular reason why you went down there with those two cars behind your engine at that time?

A. Well, we started—we were going down to work the Pabco spur first, and then I was in the cab of the engine, and I told the engineer to stop. I wanted to see the shed foreman or someone there, because this car obviously wasn't loaded. And I said it might result in a change of switching information. So we stopped and I walked over, and Mr. Husson was with [246] me, and we talked to the foreman, and it was a good thing we stopped because

(Testimony of George P. Lechner.)

then, that is the time he told us that one of the cars turned around—they were different capacity than he thought they were, than what he had ordered.

Q. So then? A. So then we backed up.

Q. You didn't go on to the Pabco plant?

A. No, then we would have had to take—one of the spur cars on the spur was an empty that would have to go out, and then that car, in addition to the one we had ahead of the engine, they were to go *go* down to this old Pabco spur in place of the two we had behind the engine originally, to go down. In other words, there had to be two cars spotted at each shed.

Q. And you were going to take the two that were behind your engine and use them in the spur where you were working? A. In the plant spur.

Q. Plant spur?

A. And one empty that we had, we took out of the plant spur, and the one we had, and the engine, were then to go down and be placed on the Pabco spur.

Q. So then you were going to do all your spotting at the old plant, at the plant spur as you call it, first?

A. Yes. Well, no, but it would be—instead of working Pabco first, then it was necessary for us to work plant spur first in order to get the empty out that had to go down to the [247] other place. Otherwise, we would have had to work both places twice, and that wouldn't have been practical.

(Testimony of George P. Lechner.)

Q. Are you sure that you had those two cars on the back of your engine, or is it just your recollection?

A. Well, it is my recollection now. I wouldn't want to swear that we had them. They might have cut them off and went in with the—they might have cut the cars off and went in with the engine, and then come out and picked the cars up later. Now that I won't swear to, but there was two cars involved and that is the approximate switching problem that was involved with the cars.

Q. Did you have a caboose with you all the time?

A. Yes, but it was down, the caboose was down on the other end.

Q. You had left that west of Bayshore Highway, had you?

A. That is as I recall it now.

Q. Now when you said that Husson was in charge of that movement, backing out of there, he was only in charge of it to the extent of stating which cars were to go out, is that right, and starting the movement backwards?

A. Well, a conductor's duties often require him to be absent himself from the crew. That is, if the foreman of the shed comes out and hollers at me, I can't stay with the crew, I have to go and see what information he wants to give me. So for all practical purposes, it is custom and practice, accepted by the railroad company, for the conductor to designate one [248] member of the crew to direct switch-

(Testimony of George P. Lechner.)

ing operations, under his supervision. That is, if I find a man is doing something in error, then I stop the movement and correct him. But if I give him the information, he receives a copy of the list the same as I do, and we call him, well, in slang terms, the "tag man." He becomes, then, the director of the switching operations, so that if necessary arise, I can absent myself from the crew without stopping the operations of the work.

Q. But that didn't become necessary in this movement, did it?

A. Well, in this movement, I didn't absent myself. However, Mr. Husson was directing this particular switching movement, and he and I had discussed the problem.

Q. Well, he wasn't directing it to the extent that he was watching the train's progress in a westerly direction from the place way down here behind the shed, was he?

A. Well, he was in his proper place, that they were to come out on the main line. Husson was going to step over from the spur onto the main track, Bellamy would have lined the switch and sent the cars down to Mr. Husson, who would then have uncoupled the cars that he didn't need for the spur, and sent the engine back to Mr. Bellamy, who would then have went in the spur with the cars we did want in there.

Q. But from the position where you placed Mr. Husson, he was not in the position where he could

(Testimony of George P. Lechner.)

be watching what was happening at the west end of the train, was he? [249]

A. Well, he knew where I was, I told Mr. Husson I would watch out for the rear end. So his only duty, then, was to give them a backup sign, after he was ready for them to pull the cars out of the spur. Mr. Quinlan walked down the opposite side, and as the field man, was sure that all the boards were removed from the cars and all the workmen were out of the cars. That was his job.

Q. Then he climbed up on top of one of the cars?

A. Then he went up the brake ladder, I guess; he was on the brake platform when I saw him.

Q. Wasn't he on the top of the car next to the end?

A. No, sir, as I recall it, he was on the rear car.

Q. I have here a statement that you gave to the Southern Pacific, a Mr. Hoyt, on September 8, 1949.

A. Well, that statement was taken without my record book in my possession, and I didn't know it was going to be used in a court trial. I was giving it to a claim agent. I didn't even state in there the month that it happened, because I didn't have any record book.

Q. Well, you tried to give it to him as best you could from memory?

A. While I was working. He came up to me on the job and took that statement.

Q. You did the best you could from your memory of it?

A. That's right, at that time. [250]

(Testimony of George P. Lechner.)

Q. Now was there anything in your record book that tells you where Quinlan was?

A. Oh, no, I remember that. That is from memory.

Q. Pardon me just a moment. Page 2, I checked those two spots. Would you read that there (handing to witness)?

A. "Quinlan was——"

Q. Don't read it out loud, just read it to yourself. Then I will take care of that later.

A. Oh. (Reading.) Well, that must be what I told this man at that time. It is his writing, not mine.

Q. That is your signature? A. Yes, sir.

Q. All right.

Mr. Bledsoe: Will it be stipulated, counsel, that he did state this at that time, what I am about to read?

Mr. Hepperle: Yes, so stipulated.

Mr. Bledsoe (Reading):

"Quinlan was riding the brakestand of the next to the last car. I think the stand was on the far end of the car from the engine and Husson was riding the last ladder of the last car."

Q. Did you have anything in your record book that you would have needed in this statement that you gave, that would have to do with what Bellamy's duties were? A. Oh, no, no. [251]

Q. Or what you had told Bellamy to do?

A. No, I don't believe so, no.

(Testimony of George P. Lechner.)

Q. Then it is true, is it not, that the only function that Bellamy was to perform was to go over there and throw the switch after the train pulled over the switch west of it?

A. Well now, you are asking the same question as the other fellow did. Bellamy knows his duties. I mean, his duties were to be the head brakeman on the job, and if he didn't know where I was, then his duty was to take such action as to govern the movement of the cars and to throw the switch.

Q. Well, isn't this true, that Mr. Bellamy had no signal to give or pass; he was just to wait until the train cleared the switch and then to line it, to put the two end cars on the harbor main?

A. Well, that is approximately correct, yes.

Q. With reference to the vehicle that was traveling along there and had the accident with Mr. Bellamy, you were not paying any particular attention to it, were you?

A. No, sir, I had to—I had no reason to.

Q. You were more interested in the train and its makeup and what it was doing?

A. And my duties, my work and the work of the men under me.

Q. I see.

Mr. Bledsoe: It is twelve o'clock, your Honor. Shall I stop now? [252]

The Court: You can go on for a minute or two.

Mr. Bledsoe: Well, I think that is about all I have now. I think that's all.

(Testimony of George P. Lechner.)

The Court: Yes. Well,—

Mr. Hepperle: I might be able to finish, your Honor, in just another minute or so.

The Court: Well, all right, but we are going to—I am going to have to leave at 3:30 today, so I was going to ask the jury if it would be all right with them to return here at 1:30. Any objection to returning at 1:30?

(No response.)

The Court: So there may be other questions.

Mr. Hepperle: Yes, your Honor. I think that is correct.

The Court: Other questions of the witness here. So we will now recess until 1:30, and during the recess, ladies and gentlemen, bear in mind the admonition heretofore given.

(Thereupon a recess was taken until 1:30 p.m. this date.) [253]

Afternoon Session

November 3, 1949, at 1:30 o'Clock

GEORGE P. LECHNER

resumed the stand.

Redirect Examination

By Mr. Hepperle:

Q. Mr. Lechner, based on your 14 years' experience as a railroad man, based on the rules of the company, based on the custom and practice,

(Testimony of George P. Lechner.)

under the circumstances and movements involved at the time of the accident, state whether or not you, as head brakeman, would have dropped off the train in the vicinity of the frog and taken a position in the highway where you could see the engineer and the men at the rear of the cut and pass signals?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial what this man would have done.

Mr. Bledsoe: We will object on the same ground.

Mr. Phelps: The question is,—it has already been asked and answered in proper form and has already been submitted to the jury.

The Court: I will allow the question.

Q. (By Mr. Hepperle): Will you answer the question? A. Well, yes.

Q. State whether or not you would have done so even if you knew the conductor was in the same position you were in.

Mr. Phelps: Same objection, if your Honor, please. You [254] are getting into hypothetical matters.

The Court: Same ruling.

A. Would you read that again, please?

Q. (By Mr. Hepperle): State whether or not you would have done so even if you knew the conductor was in the same position you were in.

A. Well, yes.

Mr. Hepperle: That's all.

(Testimony of George P. Lechner.)

Recross-Examination

By Mr. Phelps:

Q. Mr. Lechner, certainly if you had been the head brakeman and had dropped *of* this car, you would have turned around to look to see whether any automobiles were coming before you got on to the highway, wouldn't you? A. Yes, sir.

Q. You're darned right you would. And whereas you have testified as to what you would have done with respect to dropping off, that was all you have testified to, that you would drop off on the other side of the switch, isn't that right?

Mr. Hepperle: That is a misstatement of the evidence.

Mr. Digardi: It is a misstatement of the evidence, your Honor.

Mr. Phelps: Then I misunderstood the question, because my notes showed only that.

The Court: The witness was only talking from a railroad standpoint, as I understand it. [255]

Mr. Phelps: From a railroad standpoint, and hypothetically.

Q. All right, but having in mind the situation, having in mind that having dropped off the car, and having dropped off between the rails of the main line track, still in a place of safety and not on the highway, before you got out onto the highway, would you or would you not have looked in the direction from which traffic would be coming?

A. I very probably would have looked, sure.

Mr. Phelps: Certainly you would. That is all.

(Testimony of George P. Lechner.)

Recross-Examination

By Mr. Bledsoe :

Q. Assuming this question that Mr. Hepperle gave you, you would not have been giving any signals to the engineer, though, would you?

A. Well, that would depend on the circumstances, Mr. Bledsoe, because Mr. Husson was back in that spur and we come out with the cars, and I was the head brakeman. Now suppose the foreman had come out of the shed and said, "Now wait a moment, I have changed my mind again." Well then, Husson would give a stop sign. Then it would be my duty as head brakeman to pass that stop sign to the engineer, so it would necessitate me getting off the car. Therefore it would be the head brakeman's job, regardless of where I was on the job, to know, to be in a position to give the stop sign, yes, because we might have a derailment or anything happen.

Q. Your train was moving? [256]

A. That's correct.

Q. At the time the man gets off. Now——

A. Well, we get on and off all the time in switching operations.

Q. And you put yourself in that man's position, and when you got off the train, you would have been looking back toward Husson, is that right?

A. Well, you have to swing off a car facing the direction of movement.

Q. And then the first thing after that?

(Testimony of George P. Lechner.)

A. Then after that you would face the man that was directing the work, which in this case was Mr. Husson.

Q. Yes. And you wouldn't be giving a signal like this (indicating), would you? That is, the signal illustrated by the previous witness?

A. Well, I can't say as to that. I don't know for what reason Mr. Bellamy was giving that signal. Now whether he had received it or not, I don't know.

Mr. Bledsoe: That's all.

Recross-Examination
(Resumed)

By Mr. Phelps:

Q. Now, Mr. Lechner, one other thing. When the train was in backup movement, as this train was then in backward, backup movement, and if it was going along slow and easy, and assuming that Mr. Bellamy had received no signals from anybody from the rear end of the cut into the spur, there would be no occasion, then, to give any further backup signal, [257] isn't that right?

A. Well, I don't quite clearly understand what you mean, Mr. Phelps.

Q. All right, I will reframe it. I will put it this way to you: Once that train has started out and is in a backup movement and it is going along steady and easily, once that movement has started and it is progressing, as it was on this particular occasion, the engineer needs no further backup sig-

(Testimony of George P. Lechner.)

nal to keep on going, does he? A. Oh, no.

Q. No. He keeps right on going until he is given a stop signal? A. That's right.

Q. So that the only next signal he would receive would either be a stop signal or an easy signal?

A. Yes.

Q. All right. Now then—and the only men on this crew, on this particular occasion, from which Mr. Bellamy could expect to receive signals, would all be back in the direction toward the harbor, isn't that correct? A. Yes.

Q. Yes. There was nobody——

A. Because everyone of us then, after he come out, we were all, including myself, on that side.

Q. So there was no further occasion for him to look in the [258] direction of the engineer to receive any signals, was there?

A. Well, he wouldn't receive signals from the engineer, anyhow. He would give them to the engineer.

Q. Of course not.

Mr. Phelps: That is all.

The Court: Let me ask you something. Suppose a truck passed between you and the train, one of these great big trucks that may be eight or ten feet high, and the train is backing out there, and the western end is blind, isn't it?

A. Well, no, because I was across the road, your Honor, where I could see the track clear to the

(Testimony of George P. Lechner.)

Bayshore Highway. You see, on that curve there——

Q. Well, I am just saying. Suppose that your observation is obscured by some large truck or something intervening. A. Yes?

Mr. Phelps: Well, if your Honor please, I don't like to do this—it puts me in a difficult position; but I will, for the record, object to your Honor's question as hypothetical. It didn't happen on this occasion, and I don't think there is any occasion——

The Court: Well, I will withdraw the question.

The Witness: Well, I can answer it.

The Court: I will ask you this way. There was nobody on the west end of those two cars that were behind the engine? [259]

A. Nobody, no, sir.

Q. Nobody looking to see whether you ran over a child or cow or anything, except yourself?

A. No. The curve is to the left there, your Honor, and as there was nobody giving any signals on the fireman's side, it would become the fireman's duty to watch that curve as the curve is toward his left.

Q. Oh, I see.

A. And he was very probably doing so in this case. You see, where the blind side of the curve is, that is outside, or is the apex of the curve—if we are working on that side, we have to station a man over there. That is where I was stationed, on across the highway. But on the inside of the curve, the

(Testimony of George P. Lechner.)

fireman has an unobstructed view of everything to the rear on that side, so he would watch that movement.

The Court: Well, that is just what I wanted to find out.

The Witness: Does that answer it all right?

The Court: Yes.

Mr. Phelps: It certainly does.

Mr. Hepperle: That is all.

(Witness excused.)

Mr. Digardi: At this time, your Honor, we would like to offer in evidence the hospital record of the Southern Pacific General Hospital relating to the care and treatment of Mr. William Bellamy.

Mr. Phelps: To which we raise the objection, if your Honor please, that portions of it, of course, are obviously hearsay, portions call for an opinion and conclusion of witnesses who are not here. I have no objection, if your Honor please, to those portions of it which are made in the ordinary course of routine business entries. Portions of them contain conclusions and opinions of doctors, proper foundation hasn't been laid that those opinions and conclusions were made in the ordinary course of business. And if counsel has any particular—however, I want to state this: If counsel has any particular part he is interested in, if he will direct our attention to it, we may be able to get it in by stipulation. But if it is offered as a whole, we can't agree to it.

Mr. Digardi: I think your objection goes to plaintiff's exhibit No. 30 for identification in this record. If that is so, we will withdraw that and make the offer only of plaintiff's exhibit 29. That is a business entry; it is notes showing the care and treatment, not the opinions. I think your whole objection goes to these two letters, is that correct? Those are the opinions of the doctors, at any rate. Maybe we could do it this way: we will offer it in evidence and may it be received subject to a check by Mr. Phelps; if there is any particular part he objects to, he may in the meantime check over the record and make a specific objection to any specific entry in that record. [261]

Mr. Phelps: I have no objection to that procedure, so long as I have an opportunity to examine the plaintiff's exhibit 29 for identification.

The Court: All right.

Mr. Phelps: To make such an objection.

The Court: That will be the order.

Mr. Digardi: Thank you, your Honor. We offer in evidence plaintiff's exhibit 29 in evidence, subject to check by Mr. Phelps.

The Clerk: 29 in evidence.

(Whereupon plaintiff's exhibit No. 29 for identification was received in evidence.)

Mr. Phelps: Or, I assume by Mr. Bledsoe.

Mr. Digardi: And by Mr. Bledsoe. Excuse me, Mr. Bledsoe. With that, plaintiff rests.

The Court: All right.

Mr. Phelps: Then, if your Honor please, we have some matters we would like to take up with your Honor.

The Court: All right, the jury will be excused until the bailiff comes for them. The jury, during the recess, will bear in mind the admonition I have heretofore given you.

(Whereupon the jury retired, and the following occurred outside the presence of the jury.)

Mr. Bledsoe: If the court please, on behalf of the defendant Pacific Portland Cement Company, we move for a [262] judgment of dismissal in favor of that company and against the plaintiff, or a judgment of non-suit, as it is more commonly known in the State Court, on the ground, first, that the plaintiff has not established the jurisdiction of the court to try the issue as between the plaintiff and the defendant Pacific Portland Cement Company, which is a separable controversy, because the evidence indicates that the plaintiff's residence and place of residence has been in the State of California for a period of about six years now and is therefore the same state in which said defendant has residence; the second ground of our motion is based on the ground that the evidence shows without conflict that the plaintiff was himself guilty of contributory negligence as a matter of law, which proximately contributed to the accident and to his injuries.

(Whereupon the matter was argued by counsel for the respective parties.)

The Court: All right, let's hear from the Southern Pacific.

Mr. Phelps: Yes, your Honor. Primarily, if your Honor please, I should like to address myself to three preliminary motions, all motions to strike evidence. First, if your Honor please, on behalf of the Southern Pacific Company I move now to strike from the record the evidence which was read into evidence, the rules of 7(b) and 104(c), on the ground, if your Honor please, that they are completely without foundation in [263] this case. It appears affirmatively—

The Court: Do you mean they are not applicable?

Mr. Phelps: They are not applicable in any way to anything that happened in this case, and they are without foundation, by affirmative evidence.

The Court: Seven and what else?

Mr. Phelps: 7(b) and a portion of that rule which was read—I have no objection to that very first portion of it, if your Honor please, which reads, the first part of rule 7(b): “Signals must be given and acted upon strictly in accordance with the rules.”

That was the first sentence. No objection to that. We do not move to strike that portion of it. I move to strike this portion of it, which is the only remaining portion which was read into evidence: “In backing a train or cars or shoving cars ahead of engine, the disappearance from view of trainmen or

lights by which signals are given will be construed as a stop signal.”

The Court: Just a moment. Where is that, on page 13?

Mr. Phelps: That is on page 13, the last sentence of the second paragraph.

The Court: Oh, yes.

(Whereupon the motion referred to was discussed by counsel for the Southern Pacific Company.)

Mr. Phelps: Now, then, that is the first motion to strike. [264] The next two matters that I move to strike I can cover very quickly. The first is, if your Honor please, a motion to strike all evidence of the plaintiff's earnings with the defendant Southern Pacific Company, on the ground that they are not a test of any character whatsoever, that they are not any evidence from which any fair inference can be drawn by this jury as to what any prospective loss of earnings will be from this man Bellamy in the future, because he has affirmatively testified that he does not intend to retain his job as a brakeman, but instead, intends to return to Georgia to a job of \$1600 a year. So that the only evidence as to future earnings should be that evidence, and the evidence as to his present earnings is not material and it is not admissible. And now, after development on cross-examination, it becomes without foundation and not applicable.

Also, if your Honor please, I move to strike the evidence of the mortality tables, on the ground that

there is no evidence that this man is permanently disabled from doing anything in an earning capacity way.

(Whereupon the matter was discussed by counsel for the Southern Pacific Company.)

Mr. Phelps: Well, I am making my motions to strike, if your Honor please, prior to the motion to dismiss, so that if your Honor rules on these motions, or wants to defer ruling until I make my motion of non-suit, I can suit the court's [265] convenience. I do wish to direct another motion now to the merits of the case; if your Honor wishes to reserve his ruling, or if your Honor wants to rule, I will be guided by your Honor's convenience.

The Court: No, I would rather have you make your entire argument now.

Mr. Phelps: Very well. Then, if your Honor please, on behalf of the defendant Southern Pacific Company, I move for a dismissal or non-suit on the ground that the facts of the law, as shown by the plaintiff, indicate no rights to relief. This motion is joined separately and severally with a motion for directed verdict and rule 50 of the Federal Rules of Civil Procedure, as well as for a dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. Each of these motions are separately and severally made on the following grounds: First, that there is no evidence of any negligence on the part of the defendant Southern Pacific Company which proximately contributed to the happening of

this accident; that that appears as a matter of law; that there is no act or omission on the part of the defendant Southern Pacific Company, negligence or otherwise, which proximately contributed to the accident which this plaintiff sustained.

(Whereupon counsel and the court discussed the motion. During the discussion, it was determined to call in the jury and excuse them for the day. Following this a recess was taken, and said discussion continued.)

The Court: . . . so I would suggest that we continue this until Monday, and at that time I will tell you whether or not I will grant the motions, and if so, which ones I will grant.

(Whereupon, following discussion among court and counsel regarding witnesses to be held in readiness for further hearing of the matter, the jury was returned to the box and the following occurred:)

The Court: Ladies and gentlemen, we are going to recess this case until Monday morning at 10:00 o'clock. So you will be permitted to leave here immediately, but upon doing so, while the case is in recess, bear in mind the admonition that I have heretofore given you. You may leave now.

(Whereupon the jurors were excused and left the court room.)

The Court: And the court is adjourned now until tomorrow morning at 10:00 o'clock, and as

far as this case is concerned, until Monday morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Monday morning at 10:00 a.m., November 7, 1949.) [267]

Monday, November 7, 1949, morning session,
10:00 o'clock

The Court: Proceed.

Mr. Phelps: May it please the Court, on behalf of the defendant Southern Pacific Company, may I state to the Court that it is not the intention of the defendant Southern Pacific Company to call any witnesses in this case. The crew members have all been here in attendance and available to either side. I understand that possibly some of them may be called by the defendant Pacific Portland Cement Company.

Your Honor will recall that I deposited with the Court the statements of the crew members, so that they are all available, and so that I did not intend to call any witnesses on the merits with respect to the evidence of the case in its present state. At the proper time we will ask the Court to instruct the jury as to the effect of that.

If your Honor please, there is one matter that I should like to take up. Counsel, can we stipulate to those figures that I furnished as to the width and length of a standard or box car?

Mr. Digardi: I think we can stipulate that the approximate width, not being bound exactly——

Mr. Phelps: That is quite sufficient.

Mr. Digardi: The approximate width of a box car——

Mr. Phelps: Have you got those figures? I gave them to [268] you, then I lost my figures.

Mr. Digardi: We have checked them in the book and found that box cars all vary in measurements as much as five feet, but these figures are approximately nine feet, and the length of a box car——

Mr. Phelps: Of a standard box car?

Mr. Digardi: We found no such thing as a standard box car, but those are the measurements of a box car, and the other box cars vary somewhat, as much as five feet or more in length, or as much as a foot in width, but those are the measurements of a box car.

Mr. Phelps: Then will you follow me while I state this so that I may state it accurately, Mr. Digardi.

At this time, if your Honor please, I understand that it is stipulated that a box car, an average box car, in its length overall, over the end wheels is approximately 40 feet $8\frac{1}{8}$ inches; that the length inside of coupler knuckles is approximately 44 feet 10 inches; that the width over the side wheels is approximately 9 feet $9\frac{5}{8}$ inches. And all of these measurements as I have given them to you, your Honor, are approximate, as counsel has said, with one exception that I should like to not be misunderstood, and that is with respect to the width. My understanding is as far as the width of a box car, they are standard unless it is a car marked "extra

wide” and the testimony in this case is that none were so marked. I would like to add that qualification. [269]

Now then, how about the figures on the engine involved?

Mr. Digardi: On counsel’s representation that those are the exact measurements of the particular engine, we will accept those and stipulate as to the exact measurements as he has set forth on that particular engine.

The Court: Do you accept the statement as to the average length and width of the box car?

Mr. Digardi: We will accept that as the average. I can’t go so far as to say that that width would be exact except as to those marked “extra wide,” your Honor. I think we can still stipulate that those are the average width of a box car, but they may vary some.

The Court: All right, then it is so stipulated.

Mr. Phelps: Mr. Bledsoe, do you join in the stipulation?

Mr. Bledsoe: I will join in that.

Mr. Phelps: The measurements that we have on Engine 2345 are the measurements, if your Honor please, from the pulling face to the shoving iron 39 feet 11-11/16 inches.

Mr. Digardi: I might explain——

Mr. Phelps: Let me finish the measurements. Then if some explanation is necessary we can give it. The width over the cab is ten feet, and the dis-

tance from the shoving iron to the end of the cab is roughly three feet.

If your Honor please, as I understand, the distance from [270] the pulling face to the shoving iron is the distance from the front end to the back of the engine itself without the tender. The tender would add to that. If counsel wants that, I will be very happy to furnish that figure. Since there was nothing in the direction of the tender, I did not ask for it and it has not been supplied; but if you want it, we will be glad to furnish it.

Mr. Digardi: We will stipulate that those are the measurements of that particular engine.

The Court: All right.

Mr. Bledsoe: We will join in that.

Mr. Phelps: Then, if your Honor please, there was one photograph which was originally furnished counsel which we submitted along with the others and which was not selected to be placed into evidence by you. At this time, if you have no objections, I should like to have that photograph introduced into evidence. It was taken from the side of the box car at the approximate place where Mr. Bellamy got off and looking in the direction from which the truck came.

Mr. Digardi: If your Honor please, we have no objection to the picture going in—I will qualify it, as to what it shows, I think the picture itself is the best evidence as to what it does show. It shows the road in it. I think the jury can place that. As to whether or not that is where Mr. Bellamy got off is a question; but as to the picture itself, we

have [272] no objection to the picture going in evidence.

The Court: All right; it is admitted.

Mr. Phelps: Then with that qualification, we offer the picture as defendant Southern Pacific Company's exhibit next in order.

(Photograph referred to is marked Southern Pacific Exhibit G in evidence.)

Mr. Phelps: With those stipulations, and with that photograph, and relying upon the evidence already introduced and to be introduced, the defendant Southern Pacific Company rests.

Mr. Bledsoe: We will call Officer Whitmore.

EARL WHITMORE

called for defendant Pacific Portland Cement Company; sworn.

The Clerk: Will you state your name sir?

A. Earl Whitmore.

Direct Examination

By Mr. Bledsoe:

Q. Will you state your full name?

A. Earl Whitmore.

Q. Where do you live?

A. 1622 Hampton Avenue, Redwood City.

Q. Are you attached to the Redwood City Police Department? A. Yes, I am.

Q. And were you attached to the Redwood City Police Department in April of this year? [273]

A. Yes, I was.

(Testimony of Earl Whitmore.)

Q. What is your capacity with the police department? A. Police officer.

Q. Were you called or did you respond to the scene of an accident on April 4, 1949 on the Harbor Road? A. Yes, I did.

Q. Did you investigate the accident?

A. Yes.

Q. Did you make a report of the accident?

A. Yes, I did.

Q. Did you bring that report in response to my subpoena? A. Yes, I have it.

Q. May I see it, please. A. Yes.

(The document was handed to Mr. Bledsoe.)

Q. Can you tell us at what time you received the call that there was an accident?

A. At 5:42 p.m.

Q. And where were you when you received that call? A. Chestnut Street, El Camino Real.

Q. How far is that from the scene of the accident? A. Approximately a mile.

Q. How did you receive word of the accident?

A. Two-way radio in the police car.

Q. Were you alone? [274] A. Yes, I was.

Q. Did you go immediately to the scene of the accident. A. Yes.

Q. About how long did it take you to get there?

A. Oh, probably a minute and a half or two minutes.

Q. And when you arrived did you find an injured man there? A. Yes, I did.

(Testimony of Earl Whitmore.)

Q. And did you see an automobile and a train?

A. Yes.

Q. Can you tell us where the man was that was injured when you arrived?

A. He was lying on the roadway with his feet on the cowcatcher of the engine to the right side, the south side of the street.

Q. Did you see an automobile there that was pointed out as being the vehicle involved in the accident? A. Yes.

Q. Where was it located in reference to the highway itself and the center line?

A. Well, that is a two-lane highway and it was just parallel to the center line on the right side of the roadway.

Q. Now, the diagram here on the board, Plaintiff's Exhibit 6, purports to show the highway itself here, and the brown area is the track, with the third track and what we have been referring to as the main line track that keeps closer to the [275] highway, and the top of the map is toward the north and the bottom is toward the south, and as you can see, this is east to the right and west to the left. A switch stand is located at this spot to the north of the track and to the north of the highway. Did you make any diagram of the situation upon your arrival? A. Yes, I did.

Q. Did you in that diagram fix a point of impact between the pedestrian and the automobile involved?

Mr. Digardi: One moment, please. To which

(Testimony of Earl Whitmore.)

question we object on the ground that it calls for the opinion and conclusion of the witness as to the point of impact. We have no objection to the witness testifying as to what he himself observed, but as to the point of impact, that is a question for the jury. And as authority, your Honor, I cite the case of *Stuart v. Dotts*, a 1949 decision on the District Court of Appeal of California, opinion by Justice Ward. The case is in 201 Pacific (2), 820, where this exact situation came up. A policeman was called by the defendant and was asked the exact question here, to place the point of impact, and there was a decision in that case in favor of the defendant, and on appeal was reversed. And I might add that Mr. Bledsoe was the attorney for the defendant in that case.

Mr. Bledsoe: I don't know whether that adds anything to it or not, your Honor. [276]

The Court: I sustain the objection to that question.

Mr. Bledsoe: Well, your Honor, I am not asking where the point of impact is. The question I am directing to him is, did he attempt to establish the point of impact.

The Court: Well, you may ask him that.

Q. (By Mr. Bledsoe): Did you make that attempt? A. Yes.

The Court: Without stating what it was?

Q. (By Mr. Bledsoe): Now, how long have you investigated accidents? A. Eight years.

(Testimony of Earl Whitmore.)

Q. And during that eight years you have had occasion to look at marks on the pavement and things of that kind in an effort to reconstruct accidents, have you? A. Yes.

Q. When you arrived at the scene of this accident, what did you look for?

A. We looked for—the first thing we did was look for the injured, to see that he was taken care of properly. Then we tried to reconstruct the accident and we looked for skid marks, any debris on the road, anything of that nature.

Q. Did you find any broken glass any place?

A. No.

Q. What, if anything, did you find in the way of debris?

A. Just a pile of dust, dirt. [277]

Q. And that pile of dust was what, in your opinion?

A. Apparently it came from the fender of the vehicle.

Q. Will you tell us where you found that pile of dust with reference to any part of the highway?

A. Well, it was nine feet from the shoulder of the road, towards the middle.

Q. And where was that pile of dust? Can you locate it with reference to the location of the switch, as to whether it was opposite it or east or west of it? A. It was east of the switch.

Q. Have you any measurement of that? How far was it—

(Testimony of Earl Whitmore.)

A. No, I couldn't see the switch, because the engine was in front of the switch, so I didn't even know it was there at the time.

Q. Did you take any measurements from that pile of dust other than the nine-foot measurement over to the shoulder of the road?

A. We took—I took a measurement from the back of the pick-up truck that Mr. Carlson was driving to the pile of dust.

Q. What measurement was that?

A. That was thirty-five feet.

Q. Did you observe any skid marks to the rear of that automobile?

A. There were no skid marks. [278]

Q. Did you make a diagram to show the position of the train and the automobile and the pedestrian?

A. Yes, it is on the section of that report.

Q. I wonder if you could put it on this diagram, officer, and do it if you can in scale. Here is a little ruler that is of the same scale as the diagram so that that might assist you some.

A. This is rather difficult.

Q. Locate it as nearly as you can with reference to the—as I understand it, you are going to locate it with reference to the spur and main line?

A. Yes.

Q. And show us opposite what part of that it was and also how far out in the street the dust was and where the automobile was.

(Testimony of Earl Whitmore.)

(The witness drew on the diagram.)

Q. What does that little dot represent?

A. That little dot is the location of the pile of dust I spoke of on the pavement.

Mr. Bledsoe: May I use that red pencil a minute? We will call that W-1.

A. That represents the pick-up truck.

Q. Now how about the train? Would you draw on there the train and of what cars it consisted and its location?

(The witness drew on the diagram.)

Q. Those cars are supposed to be forty feet long; I don't [279] know whether you are drawing them to scale or not.

A. Let's see; no, I am not quite; they should be longer. There was the tender, the engine and two box cars made up the train.

Mr. Bledsoe: You have drawn that. May I have your pencil again. We will mark that whole train W-2. And I notice you have put it on the main line track rather than on the spur. Did you do that deliberately?

A. Correct. That is where the train was parked.

Q. Now were there any other measurements that you made besides the 9-foot one and the 35-foot one between W-1——

A. Just the width of the highway, which is approximately, I think, twenty-four feet on the diagram, which includes the shoulder of the road.

(Testimony of Earl Whitmore.)

Q. I am going to mark the automobile in the position that you found it when you got there as W-3. I think you can take your seat now.

A. I have one other on here, if you wish me to put it on there. It is Mr. Bellamy's position.

Q. Oh, you might do that.

A. This is supposed to be Mr. Bellamy.

Mr. Bledsoe: That would be W-4. Now, did you look at the automobile to see whether or not there was any damage to it?

A. Yes, I did.

Mr. Bledsoe: Have you seen these pictures?

Mr. Digardi: Yes, we have observed them.

Mr. Bledsoe: One is in evidence, if the Court please, the large picture of the car is in evidence; the smaller one is not.

Q. I will show you a photograph of a fender on an automobile and ask you if that fairly and correctly represents the damage or dent that you observed in the vehicle? A. Yes, it does.

Mr. Bledsoe: We will offer that in evidence, if the Court please.

(The photograph referred to was marked Defendant Pacific Portland Cement Company's Exhibit DD in evidence.)

Q. I will show you plaintiff's exhibit 40 and ask you if that fairly and accurately represents the vehicle that you inspected after the accident?

A. Yes, that is it.

Q. I call your particular attention to the right

(Testimony of Earl Whitmore.)

front fender which seems to be somewhat chewed up. Can you state whether or not that was fresh or old, or just describe what its condition was.

A. That fender in particular—both front fenders were all rusted up on the pick-up, and they were old damage.

Mr. Digardi: If your Honor please, I would like to object to the answer as to whether it was old or new. I do not object to the part that it was what he observed, but as to his opinion [281] as to whether that was old or new damage, I move that that be stricken.

The Court: Oh, I don't think so. I will allow it.

Mr. Bledsoe: May I pass these to the jury, your Honor?

The Court: Yes.

(Photographic exhibits were passed to the jury.)

Q. (By Mr. Bledsoe): Now, officer, at the time of this accident, what was the prima facie speed limit at the place where the accident happened?

A. Fifty-five miles per hour.

Q. Are you familiar with the schedule of how many feet an automobile goes per second at certain speeds, miles per hour?

Mr. Digardi: Which is objected to—reserve the objection, go ahead.

A. Not in my mind; I have a chart that we go by.

Q. Do you have that there?

(Testimony of Earl Whitmore.)

A. Yes, I do.

Q. Could you tell us at 30 miles an hour how many feet a second an automobile travels?

A. Forty-four feet per second.

Q. And at 20 miles an hour?

A. Twenty-nine feet per second.

Q. And at 15 miles per hour?

A. Twenty-two feet per second.

Q. Now are you familiar with the reaction time of a person [282] has to act upon observing something that has made necessary that act?

A. Yes, it takes three-quarters of a second.

Mr. Digardi: Wait a minute. He asked only if he was familiar with the time. We have an objection to the next question.

Q. (By Mr. Bledsoe): Just answer yes or no.

A. Yes.

Q. What is the reaction time of the average person for acting after seeing it is necessary to act?

Mr. Digardi: Which is objected to, your Honor, as calling for an opinion and conclusion of this witness. The reaction time is something that depends entirely upon each individual in each case and is not the subject of expert testimony in any event.

The Court: I think that is correct, Mr. Bledsoe. I will let the jury take into account their own experience. Everybody knows that from the time you see you have to act to the time you act is a difference of time, a lapse of time.

(Testimony of Earl Whitmore.)

Q. (By Mr. Bledsoe): Do you have a schedule of stopping distances for vehicles traveling at a certain speed with a hundred per cent efficiency of stopping? A. Yes.

Q. At thirty miles an hour what is the stopping distance at one hundred per cent efficiency? [283]

Mr. Digardi: Which we object to, your Honor. It depends in this case on the individual car involved, the circumstances of the highway, the circumstances of what it is made of, what the condition is at the time, the condition of the brakes, how they were applied. That is also not the subject of expert testimony, your Honor.

The Court: Well, he is talking about not this case but where everything is a hundred per cent efficient.

Mr. Digardi: If it is stipulated that the condition of the highway, everything, is one hundred per cent efficient, then we have no objection.

Mr. Bledsoe: That is what I am asking for.

The Court: Yes.

Mr. Digardi: But I think the question should be stated to cover highway conditions, brake conditions and the application of the brakes by the driver.

The Court: You can reframe your question.

Mr. Bledsoe: Include those elements, officer, that Mr. Digardi mentioned in your answer. What is the stopping distance for a vehicle at 30 miles an hour? A. 79 feet.

(Testimony of Earl Whitmore.)

Q. And what is it at 20? A. 43 feet.

Q. And what is it at 15?

A. It doesn't—the chart doesn't go that far.

Q. It doesn't go that low. By a hundred per cent efficiency, does that include making skid marks?

A. Well, a hundred per cent is a violent stopping. It would include skid marks.

Q. And if there are no skid marks, is that less than a hundred per cent efficiency of stopping, and by that I mean it isn't making a violent application; is that what you mean? A. Yes.

Q. Did you interview any people there at the scene of the accident after it happened?

A. Yes, the driver of the pick-up truck.

Q. Did you also interview the engineer of the train?

A. No, I didn't take his statement.

Q. And was there another police officer there?

A. Yes, there was.

Q. What was his name? A. Dixon.

Q. Did you record the statement from the driver of the automobile in your report?

A. Yes, I did.

Mr. Bledsoe: If Counsel has no objection I would like to have him give that statement.

Mr. Digardi: We object to any statement made by the driver of the vehicle. There has been no foundation, there is no showing that it was a spontaneous exclamation or whether it [285] was made

(Testimony of Earl Whitmore.)

in response to questions—a mere narrative in response to questions put by the police officer. We make our objection on that ground.

Mr. Bledsoe: Maybe I had better ask a little further. Officer, how soon after you arrived there did you talk to the driver of the car?

A. Immediately.

Q. You got there within a minute and a half of your call? A. That is correct.

Q. And what do you estimate the length of time between the time you received your call and the time the accident happened?

A. Seven minutes.

Mr. Digardi: We object to that. There is no foundation as to whether or not this officer, we mean this witness, knew when the accident happened. Without that foundation, he wouldn't know if it was five minutes; he just knows what he received over the call, but as to the actual happening, there is no foundation through this witness.

The Court: I think that is correct.

Q. (By Mr. Bledsoe): In talking to the driver of the automobile did you ask him questions and have him answer, or did you ask him what happened, and have him tell you and narrate what happened?

A. I asked him to make a statement as to the accident.

Q. And he made a statement, did he? [286]

A. Yes.

(Testimony of Earl Whitmore.)

Q. And who was present when that statement was made?

A. Well, as far as I know, Mr. Carlson and myself, and some of the train crew were standing around, but I couldn't name them.

Q. Again I would ask that you give us what his statement was.

Mr. Digardi: To which we object, it is self-serving, and there is certainly no foundation that this was any spontaneous exclamation. It was made in response to a question by the officer as to what happened.

The Court: Yes, I think I will sustain the objection.

Mr. Bledsoe: I think that is all. You may cross-examine.

Cross-Examination

By Mr. Digardi:

Q. Now, Officer Whitmore, of course you don't know, of your own knowledge, what time the accident happened at all? A. No, sir.

Q. Is that correct? Is that correct?

A. Well——

Q. I mean of your own knowledge; you weren't there at the scene of the accident when it happened?

A. No, the only way I know, it was told to me by one of the train crew.

Q. Of your own knowledge—I am asking you

(Testimony of Earl Whitmore.)

of your own knowledge—you don't know what time the accident happened? A. No.

Q. You weren't there, you didn't observe the happening of the [287] accident? A. No.

Q. All you know is what you observed after you arrived at the scene of the accident?

A. That is correct.

Q. You don't know whether or not, of your own knowledge, the automobile was moved between the time of the happening of the accident or whether it remained in the place where it stopped, is that correct?

A. I didn't see it stop there; I wasn't present when the vehicle stopped.

Q. So you don't know whether or not the automobile may have been moved in one direction or the other from the time the accident happened until you arrived? A. No.

Q. As to the train, you don't know where the train was stopped after it was over; this shows where you observed the train when you arrived there? A. That is correct.

Q. You don't know whether or not the train was moved between the time of the happening of the accident and the time when you arrived there?

A. No.

Q. And the same with Mr. Bellamy; you don't know where he was lying after the accident; it is merely your statement as to [288] where he was when you arrived at the scene of the accident?

(Testimony of Earl Whitmore.)

A. That is where he was when I arrived.

Q. You stated you saw a pile of dust located in the highway, is that correct? A. Yes.

Q. You also stated when you arrived there the automobile was down the highway some 35 feet, is that correct? A. That is correct.

Q. There were no skid marks leading from the pile of dirt to the place where the car was?

A. There were no skid marks.

Q. So you wouldn't have reason by way of skid marks to be able to trace it back to the particular spot where this pile of dirt that you testified to was located, is that correct?

A. Yes, I could trace it to the pile of dirt.

Q. There were no skid marks running from the pile of dirt to where the automobile was?

A. No skid marks.

Q. When you arrived there you didn't observe any cars to the west of the engine, is that your testimony?

A. There were no cars west of the engine, that is correct.

Q. And only two cars could be east of the engine? A. That is right.

Q. When did you first become aware of the fact that you would be called a witness in this case?

A. Wednesday of last week.

Q. And who——

A. Pardon me; Monday of last week.

Q. Who contacted you at that time?

(Testimony of Earl Whitmore.)

A. I don't know the party's name; he said he was subpoenaing me—serving me with a subpoena at that time.

Q. Did he talk to you at that time——

A. No, sir, he did not.

Q. Concerning what you knew about the facts of this accident? A. He did not.

Q. Have you talked to anyone representing either of the defendants concerning the facts of this accident?

A. I have talked to no one until I came here in court Wednesday, the first day.

Q. At that time who did you talk to?

A. I talked to Mr. Bledsoe.

Q. Calling your attention to the date of the accident and the date of your report that you have referred to, did you talk to anyone at that time concerning the facts of this accident, anyone representing either of the defendants? A. No.

Q. In other words, your testimony is that this accident happened in April of 1949, and from that date you haven't talked to anyone representing any one of the parties here in court?

A. That is correct. [290]

Q. Until the time you were subpoenaed to appear here last Monday, is that correct?

A. That is correct.

Q. Now, in the course of your duties, you have been to many accidents; you go every day or when-

(Testimony of Earl Whitmore.)

ever there is an accident, you are called, if you happen to be on duty, is that correct?

A. That is right.

Q. Have you been to a good many accidents since the time of this particular accident, is that correct? A. Yes.

Q. There was nothing about this particular accident in and of itself to keep your mind fresh on the facts that happened in this case, was there?

A. Only by referring to the accident report.

Q. In other words, your testimony here on the stand is not based on your independent recollection, but you have refreshed your memory from the accident report, is that correct?

A. Yes, my accident report.

Q. So you have no independent recollection of what you have observed at that time?

A. No, I can't remember every detail of every accident; it is impossible.

Mr. Digardi: I think that is all.

Mr. Phelps: I have no questions, your Honor.

Redirect Examination

By Mr. Bledsoe:

Q. Officer, what did you determine that pile of dust to be when you observed it there?

A. Well, it appeared to me to be debris from underneath the car which would gather from road dust and dirt that covers underneath the fenders.

Mr. Digardi: We object to that, your Honor, and move to strike his answer as to what it ap-

(Testimony of Earl Whitmore.)

peared to be. Let the jury determine what it was.

The Court: Well, I think the question is what he observed it looked like anyway.

Q. (By Mr. Bledsoe): Is that a phenomenon that you often find after a blow of striking a fender of an automobile? A. Yes.

Q. Now this report that you have here, was that filed right away after the accident?

A. Yes, it was.

Q. And that is available to the public, is it not, after six months?

A. After six months, yes.

Q. Anyone can see it?

A. That is correct; any one concerned with the accident.

Mr. Bledsoe: That is all. Thank you.

Mr. Digardi: That is all, your Honor, and we would like this witness to remain in attendance.

Mr. Bledsoe: Officer Dixon. [292]

DENTON S. DIXON

called as a witness on behalf of defendant Pacific Portland Cement Company, sworn.

The Clerk: Will you state your name, please?

A. Denton Stanley Dixon.

Direct Examination

By Mr. Bledsoe:

Q. Where do you live?

A. 226 Robles, Redwood City.

(Testimony of Denton S. Dixon.)

Q. Are you on the Redwood City police force?

A. Yes.

Q. What capacity on the police force?

A. Police officer.

Q. How long have you been on the police force?

A. One year.

Q. Were you on any other police force before then? A. No.

Q. Were you on the Redwood City police force in April of 1949? A. Yes, sir.

Q. Did you respond to an accident call on Harbor Road on April 4, 1949?

A. Yes, I did.

Q. Where were you when you heard about the accident?

A. I was on Broadway, downtown.

Q. Were you in an automobile?

A. Yes, sir. [293]

Q. Were you alone? A. Yes.

Q. You weren't with Officer Whitmore?

A. No, one-man car.

Q. Do you know about what time you received the word of the accident?

A. It was at 5:42 over the radio; I heard it when Officer Whitmore did.

Q. You got the same call?

A. Yes, it called two cars to the same accident.

Q. Did you then go there to the scene?

A. Yes.

(Testimony of Denton S. Dixon.)

Q. How long did it take you to get there from where you had been?

A. Approximately two minutes or three minutes, at the most.

Q. This location you were on was Broadway and where?

A. Downtown; it was probably Broadway and Winslow.

Q. In Redwood City?

A. Yes, or vicinity.

Q. And that is about how far in mileage from the place of the accident?

A. Approximately a mile and a half.

Q. Where is the post office located in Redwood City? A. It is on Jefferson.

Q. How far—— [294]

A. Between Broadway and Middlefield.

Q. How far is that from the scene of the accident, approximately? A. A mile.

Q. Can you tell me whether you got to the scene of the accident ahead of Officer Whitmore, behind him, or at the same time?

A. I can't say; I never noticed his car.

Q. Did you observe whether he was there when you got there? A. No.

Q. Did you observe an injured man when you arrived there? A. Yes, sir.

Q. Where was he when you saw him?

A. He was laying on the north side of the road with his feet up on the cowcatcher of the engine.

(Testimony of Denton S. Dixon.)

Q. Did you observe an automobile that was pointed out as being involved in the accident when you got there? A. Yes.

Q. Was it still in the highway?

A. Yes, it was.

Q. Officer Whitmore has put up here a diagram and W-3 as being the place where he observed the automobile. Would your idea of it be any different, and if so, would you mind putting it down on the diagram?

A. No. I went to the injured party immediately upon arrival; I went over to the sub-station driveway, parked my car, walked right straight across to the injured man to see if there was [295] anything I could do, if he was bleeding, to stop his blood, or do something until the ambulance got there.

Q. In other words, you and Officer Whitmore sort of divided up your duties there, did you?

A. Yes. Well, the first one that arrives, he goes to the bad part of the accident, and if I arrived first before Officer Whitmore I went to the injured party. Maybe he had been there before; I don't know.

Q. Did you busy yourself at all with reference to measuring anything or assisting Officer Whitmore in that respect?

A. Only from the point of impact to the injured party.

(Testimony of Denton S. Dixon.)

Q. Did you observe the train that was located there? A. Yes.

Q. From your observation of the train, was it on the spur track or was it on the main line track?

A. It was on the main line.

Q. Did you talk to any of the people there at the scene of the accident about whether they had witnessed it?

A. I talked to some of the train crew; they identified themselves but wouldn't make any statement, except the engineer.

Q. The engineer was the only one that would make a statement? A. Yes.

Q. Did you talk to the driver of the car at all?

A. No, I did not.

Q. Did you observe a spot of dust on the pavement? [296]

A. Yes, that is where I took my measurements, from the debris to where the injured party was laying.

Q. You didn't measure from that spot to where the automobile was? A. No.

Mr. Bledsoe: I think that is all. You may cross-examine.

The Court: We will take a recess at this time for ten minutes. During the recess, ladies and gentlemen, bear in mind the admonition the court has heretofore given you.

(Recess.)

(Testimony of Denton S. Dixon.)

Cross-Examination

By Mr. Digardi:

Q. Mr. Dixon, you don't know of your own knowledge when this accident happened, do you?

A. No.

Q. You weren't there and didn't see the accident happen; you only know you received a call and you proceeded immediately to the scene of the accident upon receiving that call? A. Yes.

Q. You don't know whether or not the automobile was moved or stationary, whether it was at the point it stopped? A. No.

Q. You don't know whether the trains were moved after the accident and before the time you arrived? A. No.

Q. You state there were no skidmarks; you observed no skidmarks [297] on the highway, is that correct? A. That is correct.

Q. Did you look for skidmarks? A. Yes.

Q. But you didn't observe any. Did you observe whether or not there were cars to the east of the engine? A. Yes, I did.

Q. Now do you know of your own knowledge whether there were such cars, or are you just taking it because the diagram on the board shows that there were no cars?

A. No, there were no cars to the rear of the engine.

Q. You remember that clearly of your own knowledge? A. Yes.

(Testimony of Denton S. Dixon.)

Q. And you further stated that you did talk to various members of the crew, is that correct?

A. Yes, I did. The engineer gave a statement.

Q. And the others stated to you that they did not see the impact, is that correct?

A. That is right.

Q. They identified themselves as members of the crew but stated that they did not see the accident?

A. That is right.

Q. Is that correct? And Mr. Quinlan told you that, is that correct?

A. No, Mr. Quinlan said he was at the rear of the train. [298]

Q. And didn't he state to you he didn't see the impact?

A. No, Mr. Edwards said that he seen the impact.

Q. And Mr. Quinlan stated to you he did not see the impact? A. That is right.

Q. That is correct? A. Yes.

Mr. Digardi: I think that is all.

The Court: That is all.

Mr. Bledsoe: Thank you, Officer.

Do you want him to stay, too? Do you still want both officers?

Mr. Digardi: No; I think, your Honor, both officers may be excused.

The Court: All right.

Mr. Bledsoe: Call Mr. Quinlan.

JOSEPH QUINLAN

called as a witness on behalf of defendant Pacific Portland Cement Company, sworn.

The Clerk: Will you state your name, sir?

A. Joseph Quinlan.

Direct Examination

By Mr. Bledsoe:

Q. Where do you live, Mr. Quinlan?

A. 388 West San Fernando, San Jose.

Q. Are you presently employed by the Southern Pacific? [299]

A. I am.

Q. And were you employed by the Southern Pacific on April 4, 1949?

A. I was.

Q. Now were you a member of the train crew in which Mr. Bellamy was working at the time he was injured on that date?

A. Yes, sir.

Q. What was your job on the train?

A. I was what is known as the field man or the rear end brakeman.

Q. Since the happening of that accident, you gave a statement, did you, to the Southern Pacific about the accident?

A. I did.

Q. I will show you defendant Southern Pacific for identification exhibit No. C and ask you to look at that and see if that is the statement?

A. Yes, sir, this is correct; this is the one. It has my notations on it.

Q. You have just heard Officer Dixon state that you advised him after the accident that you didn't see it?

(Testimony of Joseph Quinlan.)

A. I would say that Officer Dixon is mistaken in not knowing one member from another. I certainly wouldn't make a statement like that in view of the fact of the position I was on that train.

Q. Did you mention you didn't see the accident?

A. It has been brought out in this court as to where I was, and according to the rules, and actually where I was, on the standard box car 15 feet above the top of the rail—that means that when I was standing at that brake platform my torso was above the roof of the car, which would have made me roughly somewhere between 17 and 18 feet above the top of the rail, and in an advantageous position to see in all directions.

Q. Then you were in a position to see the accident? A. I was.

Q. And your position was where, Mr. Quinlan?

A. I was on the car next to the engine at the top of the long ladder, close to the brake platform.

Q. Then were you in a position where you could see the engineer himself? A. Yes, sir.

Q. Were you in a position where you could see Mr. Bellamy where he was riding on the side of the car? A. I was.

Q. And did you see Mr. Bellamy leave the side of the box car? A. I did.

Q. And when he left the side of the box car what did he do?

A. He left the box car in an approved manner,

(Testimony of Joseph Quinlan.)

his body facing the equipment, and he made one or two steps after he hit the ground, not more.

Q. In which direction? [301]

A. Away from the car.

Q. Toward the center of the highway?

A. Right.

Q. And with his back in which direction?

A. To the highway.

Q. Well, by "to the highway" do you mean his back was north, south, east or west?

A. May I stand up and illustrate?

Q. Yes, surely.

A. When he left the car, he left it like that. (Illustrating.) You pull your foot away, and as you do, your momentum puts your weight on your foot, and a little way out, roughly about two feet, and you go in that direction and you go to the right. When you step off like that you can whirl a little bit and you look both ways. We weren't going over four miles an hour. Now, as I say, the gentleman didn't move very far when he got off.

Q. About how many steps would you say he took? A. Not over two.

Q. And did he take that in a backward movement?

A. In a swinging movement; he wasn't walking backwards.

Q. How about the conductor of the train? Did you see him?

A. He was in a position where he could direct,

(Testimony of Joseph Quinlan.)

where he should be under the rules, over there on a little mound across the road. [302]

Mr. Digardi: I move to strike that out as not responsive to the question, your Honor. He asked where was he, and he made his conclusion as to what the conductor could see. He was not over where the conductor was.

The Witness: I could see the conductor, if you please.

The Court: "According to the rules"—I will let that part of the answer go out.

Mr. Bledsoe: Did you make any sound or outcry to Mr. Bellamy before the accident?

A. Yes, sir, just as that truck went by, it was there, I seen it was going to happen; I could see it before it happened, and I yelled, "J. C., look out!" That stands for an expression I won't use in court. I yelled, "J. C., look out!" And he couldn't hear me, and then the next thing there was a big pile of dust spinning in the road, he turned around three or four times, and staggered, and then fell to the pavement.

Q. Did he step off of the box car on to the highway or on to some other spot?

A. He stepped on to the thing that you have on your diagram there; I don't know just what the distance was, but from the tie ends to the dirt next, there is no real distinction between the track and the road. It is very hard to say just how he stepped, how much is dirt, because the road, it tapers off

(Testimony of Joseph Quinlan.)

from macadam to dirt and it is more or less traveled on right close to the tie ends. [303]

Q. Well, did he step off between any rails?

A. No.

Q. Now the automobile after the collision moved how far, about?

A. Oh, I don't think it moved over 25 or 30 feet, and I wouldn't confine myself to an exact statement.

Q. Now after the automobile stopped was it changed or moved any after the accident?

A. No, sir.

Q. Which way was Mr. Bellamy facing when he stepped off, or can you tell us whether he was facing Redwood City or facing the harbor?

A. He was at an angle. When you step off a train you usually step in the direction of motion, which made him at a 45 degree angle toward Redwood City. That is a physical fact, that you can only leave a train in a certain manner; I will illustrate. As you are on the side of the car like this, you let go, that would be a fool's trick, you would fall on your back. So when you leave go the grab-iron and turn, you must let go like this, which puts your body, as I say, in an angling position.

Q. He was facing the train engine more or less, then?

A. At a trifle; he wasn't at right angles to the train, no.

Q. What part of the truck and the man came together, did you notice?

(Testimony of Joseph Quinlan.)

A. Just behind the door, the fender there, the body. As I [304] remember, this truck had a slight beveled edge on the side of the pickup, and I would say that he rolled on the edge and the fender when he was struck.

Mr. Bledsoe: I think that is all. Thank you.

Cross-Examination

Mr. Hepperle: Would you mark this, Mr. Clerk?

(Photostatic copy of employee's report of accident Form 2611 was marked Plaintiff's Exhibit No. 42 for identification.)

Q. (By Mr. Hepperle): I show you a paper, Mr. Quinlan, and ask you if that is the 2611 accident report you made following the accident, the report you made to the Southern Pacific Company? Do you recognize your signature? A. Right.

Mr. Bledsoe: May I see it, counsel?

(Document presented to Mr. Bledsoe.)

Q. (By Mr. Hepperle): You have previously identified these papers marked defendant's exhibit C as a further report you made for the Southern Pacific Company?

A. Yes, these are papers I made out.

Q. You made that out September 11, 1949?

A. That is right.

Q. And you made this one out April 27, 1949, the 2611? A. Correct.

Mr. Hepperle: We offer in evidence, your

(Testimony of Joseph Quinlan.)

Honor, plaintiff's exhibit No. 42 for identification, the 2611 accident [305] report, and the other report dated September 11, 1949 presently marked defendant's exhibit C.

Mr. Phelps: If your Honor please, there is an objection to only two very small portions of them, which I could direct your Honor's attention to. On one, there is a matter on the 2611 report which would call for hearsay; and the other is an item in the report which is obviously a speculation and conclusion. Except for those two matters which I direct the court's attention to, I have no objection to them.

Mr. Bledsoe: I have no objections, your Honor.

The Court: Excluding those two matters.

Mr. Phelps: As they are read in, I can direct your Honor's attention to them and ask for the court's ruling on those two matters.

The Court: Yes.

Mr. Hepperle: May I have a moment, your Honor, and have counsel point them out to me?

Mr. Phelps: Certainly, certainly.

Q. (By Mr. Hepperle): How fast was the speed of this move before the accident?

A. About four miles an hour.

Q. And how fast was this truck going immediately before the accident?

A. I would say somewhere in the vicinity of 20 miles an hour. I would probably judge on an automobile passing me. [306]

Q. When did you first learn, Mr. Quinlan, that you were going to be a witness?

(Testimony of Joseph Quinlan.)

A. When I was subpoenaed.

Q. When was that?

A. That was, I believe it was Tuesday night.

Q. Who subpoenaed you?

A. I don't know the gentleman's name.

Q. Was it——

Mr. Bledsoe: I sent one out for him, if you want to know.

Q. (By Mr. Hepperle): Was it on behalf of the railroad or the cement company?

A. The cement company.

Q. Where were you when you were subpoenaed?

A. At my residence; sound asleep, as a matter of fact.

Q. You have talked to no one else about being a witness in this case?

A. No, sir; oh, I beg your pardon. Do you mean did I ever talk to counsel before?

Q. Counsel or anyone else?

A. Yes, I was present in Mr. Phelps' office at one time, we made those depositions, I believe, but other than that, no; no other outside individual.

Q. You made some depositions in Mr. Phelps' office?

A. I wouldn't know what you call it, the way we talked together; I don't know whether I said the right word or not. [307] Maybe Mr. Phelps can tell you.

Mr. Phelps: Your Honor, if you wish, he used the word "deposition." Obviously his deposition

(Testimony of Joseph Quinlan.)

has never been taken. He was at my office and I questioned him about the accident and so forth before it was to come to trial the first time. I imagine that is the occasion he has in mind, because that is the only time he was ever in my office.

The Witness: That is what I mean; in other words, I had been before——

Mr. Phelps: That was about ten days ago.

Q. (By Mr. Hepperle): You were called into Mr. Phelps' office about ten days ago with all the other members of the crew, is that correct?

A. That is correct.

Q. You spent all day there, is that correct?

A. That is right.

Q. Have you given any other written statement in addition to the two that we have just identified?

A. None that I know of.

Q. Ever had any conversation with any member or any person representing the cement company until you came here to court?

A. No, sir, that was a surprise.

Q. He didn't know what you were going to say?

A. No, sir.

Mr. Bledsoe: That calls for his conclusion. I read his [308] statement before I had him subpoenaed.

Q. (By Mr. Hepperle): This train crew had the usual number of brakemen? A. Correct.

Q. Each man had some work to do in this move?

A. Yes, sir.

(Testimony of Joseph Quinlan.)

Q. You knew what Mr. Bellamy's duties were?

A. I did.

Q. What are the duties of a head brakeman on a move such as that?

Mr. Phelps: I am going to object to that as not within the scope of cross-examination, if your Honor please, calling for an opinion and conclusion and not a proper part of this case.

The Court: Yes.

Mr. Phelps: Which is the cement company's case and should not be put in at this time.

The Court: I think at this stage of the case that objection is well taken. If it was in the very beginning of the case I wouldn't make any point.

Mr. Hepperle: Yes, your Honor.

The Court: Here is a witness that has not been examined as to the duties of anybody on that train. If you want to make him your own witness in rebuttal, perhaps you can, but this is cross-examination.

Q. (By Mr. Hepperle): And it is your testimony that you were [309] riding the same car that Mr. Bellamy was? A. No, sir.

Q. Didn't you just testify you were riding the car next to the engine on the top of the long ladder that went to the brake platform?

A. I did, yes. Mr. Bellamy was at the opposite end, if you please, because when we back out of there that means the pilot of the engine was facing

(Testimony of Joseph Quinlan.)

me, and I was another 50 feet behind that on the car.

Q. In other words, it is your testimony that Mr. Bellamy was riding the end closest to the pilot and you were riding the other end?

A. I was riding the end closest to Redwood City. Remember, excuse me, this has been a long time; I am trying to tell you the best I remember, and I do know that on this particular move he was certainly in his place, and his place was farthest away from me at the Redwood City end, and I was at the harbor end.

Q. He was on one end of the same car that you were riding on the other end?

A. He was at the opposite end of the train, yes.

Q. My point is, Mr. Quinlan, is it your testimony that you were riding one end of the freight car and Mr. Bellamy was riding the other end of the freight car?

A. Yes, he wasn't at the same place I was. [310]

Mr. Hepperle: We offer to read at this time, your Honor, in evidence two statements, plaintiff's exhibit 42, and the other statement—

The Clerk: The other statement, formerly defendant Southern Pacific exhibit C for identification is marked Plaintiff's Exhibit No. 43.

(Form 2611 was thereupon marked Plaintiff's Exhibit No. 42 in evidence.)

(Testimony of Joseph Quinlan.)

(The statement relating to accident, formerly marked Southern Pacific Exhibit C was thereupon marked Plaintiff's Exhibit 43 in evidence.)

The Court: I don't know which part of those statements contain conclusions of law or rather hearsay statements, and so you will have to agree in reading them to omit that portion.

Mr. Hepperle: Counsel has identified the portion to which he objects, your Honor. We have no objection to omitting that portion, and if I may, I can show the portions to your Honor right now.

The Court: Yes, do that, would you?

(Documents exhibited to the court.)

The Court: Read now, leaving out——

Mr. Hepperle: I will, your Honor, omitting the two portions——

The Court: The two portions I have deleted on the ground that they are mere hearsay and conclusions of the witness. [311] In view of the fact that certain of these statements are going to be left out, I don't think those two documents should be put into evidence. In other words, then they would be all in. I think, on the other hand, you can read them into evidence, deleting the portions that I have indicated.

Mr. Hepperle: If your Honor please, if your Honor is going to delete that——

(Testimony of Joseph Quinlan.)

Mr. Digardi: There are other portions of his opinions and conclusions that we may also leave out then. We were going to offer the whole thing, but there are other opinions and conclusions of this witness that might also be left out.

Mr. Bledsoe: I make no objection to the other conclusions that he makes in there.

Mr. Hepperle: If I might proceed, your Honor, the first statement marked Plaintiff's Exhibit 42 is a printed form with a heading at the top, "Employee's Report of Accident. Do not use for grade crossing or other vehicular accidents."

"Employees signing this report must answer all questions applicable to the accident, using other side if more space is needed for any purpose. Conductors and engine foremen must show on reverse side of their report name and position of all members of train and engine crews.

"Division—Coast. Nearest station, Redwood Jct., State, Calif. Nearest Mile Post, 26. Date of accident, 4 April 49. Time of accident 5:35 p.m. [312] Clear, cloudy or foggy, clear. Raining or snowing, Daylight, dusk or dark, daylight. Kind of train, freight. Train No., X2345W. Lds., 11. Mtys., Tonnage in Ms., 1095. Engine No., 2345. Helper engine No., Direction, east. Speed, 40 MPH.

"Casualties to persons

"Name and address, William A. Bellamy; age 50;

(Testimony of Joseph Quinlan.)

Sex, male; married or single, single; Occupation, if employe, Bkrmn; Nature and extent of injuries, broken left arm and left collar bone, possible rib fracture, possible internal injuries; estimated days disability, unknown.

“Names and addresses of witnesses: if employe, give occupation: F. G. Edwards, Engr., S.P. Co., J. F. Quinlan, Bkrmn, S.P. Co.

“What was done with or for injured persons, called ambulance. By whose direction, myself & conductor. Name and address of attending doctor Names and addresses of relatives or friends, unknown.”

The material in the next two questions and answers I will delete at this time, your Honor.

“Could accident have been avoided? Don’t know. If so, how? Did any jerk or rough handling of train cause or contribute to accident? No. If so, explain fully,

“Main, siding or yard track, Main. Straight or curved, right or left, curved left. Level, up or down grade, level. In cut or on fill,

“Distance run after accident, 35 feet. Was engine running forward or backward? Back. Was forward headlight burning? No. Was back-up headlight burning? No. If shoving or backing cars, who was on leading car? Where was he riding on car and on which side? What signals were given, by whom and by what means? None. Was engine bell ringing? Yes. How long before accident?

(Testimony of Joseph Quinlan.)

Continuously. Was engine whistle sounded?
Explain when or where and how many times,
Initials and numbers of all cars and engine immediately involved in accident, None. Did any defect or other condition on or about engines, car, equipment, roadbed, tools, or other facilities cause or contribute to accident? If so, describe fully, None.

“Was view of engineer obstructed? Yes. If so, by what? Curve. Was view of fireman obstructed? Yes. If so, by what? Engine. Did you see the accident? Yes. Where were you when it occurred? Riding on rear car.

“Detail of cause and circumstances (if more space needed, use and sign other side.) While switching Paraffine Spur, Bellamy dropped off at switch on engineer’s side after alighting stepped three feet away from cars acct. of curve just in time to be struck by car driven by J. E. Carlson; emp. P. P. Cement Co., Calif. BC 8992. He did not see car due to facing equipment.

“I, Jos. F. Quinlan, Jr., have read and understand the foregoing statement and it is true and correct to the best of my knowledge and belief.

Dated April 27, 1949. Occupation, Bkmn.”

The other statement is dated September 11, 1949, witnessed by E. R. Lyons.

May it be stipulated, Mr. Phelps, Mr. E. R. Lyons is a claims agent for the Southern Pacific Company?

Mr. Phelps: Yes.

Mr. Hepperle: “Statement of J. F. Quinlan.

(Testimony of Joseph Quinlan.)

Sheet No. One. Present address, 388 West San Fernando Street, San Jose, California.

“Address through which you may always be reached, Above.

“Occupation, Brakeman. Employer, Southern Pacific Company. Business address, San Francisco.

“Where did accident occur? Redwood Harbor. Date, April 4, 1949. Hour, 5:30 p.m.

“Where were you when accident occurred? Riding the train. [315] “Names and addresses of other witnesses. Conductor Lechner might have seen the accident. Names and addresses of others who were nearby. Rest of the crew members. Driver of truck involved. Did you witness accident? Yes. Give full account of your knowledge of accident. My name is Joseph F. Quinlan and I am employed as a brakeman by the Southern Pacific Company. On April 4th, 1949, I was assigned to Extra 2345 West under Conductor Lechner. Other brakemen were Hussan and Bellamy. This is a local switch engine working down the peninsula to Redwood Junction. At about 5:30 p.m. we were out on the Redwood Harbor main line doing some work. We had left the main portion of our train on the west side of Bayshore Highway. We had several cars in behind the engine—I don’t recall exactly how many, but there might have been two to five cars—and the engine was headed railroad east toward the Harbor. There were three cars behind the engine. The move was

(Testimony of Joseph Quinlan.)

west toward Bayshore Highway with the engine backing and the train was at that time on the Harbor main. Weather conditions were daylight, clear, and dry. Speed of the move was about 8-10 miles per hour. I was riding the side ladder of the trailing car on the engineer's side next to the roadway. Was at the rear end of the car. Bellamy was riding a side [316] ladder ahead of the engine also on the engineer's side. He was about two car lengths ahead of the engine. I do not know how many cars there were ahead of the engine. Bellamy was to drop off at the Paraffine Company spur switch and wait for the cut to clear the switch points and then was to throw the switch so we could put the trailing three cars into the Paraffine Co. spur. I do not know where brakeman Hussan was at the time of this move. He might have been in the cab of the engine. He was not in my range of vision. I could see Bellamy clearly from my position on the side of the car. As he neared the place approximately opposite the switch he started to step off the stirrup on which he was standing. I could see a light pick-up truck traveling westward on Harbor Road in the same direction as our move. Speed of truck was about 20 miles per hour. It was in the right-hand traffic lane. This truck passed our move. Just as soon as I saw Bellamy step out from the stirrup starting to detrain I realized the danger and yelled at him. Only yelled a loud shout at him. No particular words. He evidently did not

(Testimony of Joseph Quinlan.)

hear me. He stepped onto the ground and as he took a step or two more he went into the side of the passing truck. Bellamy, on the side of the car had been [317] facing west in the direction of our move, which is proper. He did not look over his shoulder before stepping off. If he had done so, he could have seen the truck easily. The truck driver had no time to try to stop or do anything to avert the accident. The front end of the truck did not hit Bellamy. As Bellamy went into the side of the truck a protruding section on the right side of truck behind the cab caught Bellamy. Bellamy was never actually facing the truck before being hit. He was hit on the left side from the rear. He was spun around several times as he went to the ground. I was about 6 car lengths and an engine length east of him at time he was hit. The truck driver and I picked him up and laid him down on the side of the road. The truck came to a stop in about 30 to 40 feet beyond the point of impact. At time of being hit Bellamy was only about two feet into the street from the north edge. I went to call for an ambulance while Brakeman Husson rendered some first aid treatment. I only saw Bellamy for about 5 minutes after he had been hit. He was conscious at the time. The move of the train had no bearing on the injury. Move was smooth and normal. OK as far as I could see. There were no jerks or lurches of the train which might

(Testimony of Joseph Quinlan.)

have caused Bellamy to lose his balance. He was in full control of his movements as he detrained. So it appeared to me as I watched him. I have worked out on the Harbor line off and on for the last seven years. All of us on that crew were acquainted with the track layout and the type of work to be done. We all had worked out there many times before. No definite instructions were given to us by the conductor as to which side of the train we were to work on or as to the danger involved by the road and the tracks being so close. We all knew that we would work on the engineer's side. It is past custom. We always work on the engineer's side whenever possible. The tracks and road both curve to the left going east out there. As far as I now recall we have always worked on the engineer's side out on the job when I have been on it. If we were to work on the fireman's side there might be some industrial obstructions to the clearance of the passing cars. The track is very close to the roadway. The tie ends are only about 4-6 inches from the north edge of the roadway's finished surface. Roadway is asphalt, I believe. In my own case I always make a point of looking for roadway traffic before stepping off a move out on this track. The footing, of course, is very good since it is right at the road's edge. I am quite sure no specific instructions [319] were given to Bellamy as to the danger involved account the road traffic because they would have been given to

(Testimony of Joseph Quinlan.)

all of us brakemen. None of us had any objections to working on the engineer's side because of past custom and it is actually the safer side. Scene of this accident was only about 600 to 700 feet east of Bayshore Highway.

"I, J. F. Quinlan, have read the above four-page statement and it is true and correct to the best of my knowledge and belief.

Dated September 11, 1949.

/s/ J. F. QUINLAN,

E. R. LYONS,

Witness.

Q. (By Mr. Hepperle): In other words, Mr. Quinlan, it is your testimony now that you were riding the same car that Mr. Bellamy was riding, but in the statement you gave to claims agent Lyons on September 11, 1949, you stated you were six car lengths away from Mr. Bellamy at the time the accident happened.

Mr. Bledsoe: That assumes a meaning to six car lengths, boxcar lengths, and it doesn't necessarily mean that. We will object to it on that ground.

The Court: Well, it is argumentative, anyway.

Mr. Hepperle: That is all.

Redirect Examination

By Mr. Bledsoe:

Q. Just one question. I notice in that [320] form

(Testimony of Joseph Quinlan.)

report that was read, that you have the train going 40 miles an hour.

A. That must be a typographical error. It certainly couldn't be going 40 miles an hour on a switching movement. I don't know why that appeared there. That is obviously a flagrant error. No one would write down the train was going 40 miles an hour, boxcars switching. I don't know how that came to be there.

Q. I think you said on direct it was 4 miles an hour? A. That is right.

Q. Is that more nearly correct?

A. That is absolutely right.

Mr. Bledsoe: I think that is all.

Mr. Phelps: I have no questions.

Recross-Examination

By Mr. Hepperle:

Q. Isn't it a fact, Mr. Quinlan, that the truck was going about 40 miles an hour when you first saw it? Isn't that correct?

A. I am not an authority on the speed of moving vehicles. There is only two ways; that is by checking the speedometer and measuring the distance that they stopwatch. Other than that it is pure hazard.

Mr. Hepperle: That is all.

Mr. Bledsoe: That is all.

Mr. Carlson, will you take the stand? [321]

JOSEPH E. CARLSON

called as a witness on behalf of defendant Pacific Portland Cement Company, sworn.

The Clerk: What is your name, sir?

A. Joseph Eugene Carlson.

Direct Examination

By Mr. Bledsoe:

Q. Where do you live, Mr. Carlson?

A. 353 Santa Clara Avenue, Redwood City.

Q. How long have you lived there?

A. That address, I lived there three and a half years.

Q. And how long have you lived down there in San Mateo County? A. About 18 years.

Q. Are you married? A. I am.

Q. And how old are you? A. 66.

Q. Are you employed by the Pacific Portland Cement Company? A. I am.

Q. How long have you been employed by that company? A. Oh, 18 years and 9 months.

Q. In April of 1949, this year, you were employed by them, were you? A. I was.

Q. And were you working for them the day of the accident? [322] A. I was.

Q. What was the nature of your job there?

A. Well, I am listed on the payroll as janitor and truck driver.

Q. Among your duties, what did you have to do at the end of the day's work?

(Testimony of Joseph E. Carlson.)

A. I had to take the mail, deliver the mail to the post office.

Q. Deliver it for going out, is that it?

A. Going out, that's right.

Q. On that particular day when this accident happened, you were driving a pick-up truck, were you? A. I was.

Q. And these pictures, defendant Portland Cement DD and plaintiff's exhibit No. 40 that I am showing you, do these pictures correctly show the condition of that truck as it was immediately after the accident happened? A. Yes, it does.

Q. That is the truck that you were driving?

A. That is the truck.

Q. Were you alone in the truck?

A. I was alone.

Q. I notice a cracked windshield there on the right hand corner. Was that made in the accident?

A. No, that has been done for years. That is expansion of the glass set in a steel frame; it just cracks the glass. It was fit in there too tight.

Q. I notice the right front fender looks somewhat battered and worn and chewed up.

A. This here is rust. In fact, the back fenders are—were recently put on before the accident; they were practically new. They rusted clear off, and this here was just about to fall off.

Q. The front ones?

A. That is right, the deterioration of salt water.

Q. I see lots of marks on this front fender.

(Testimony of Joseph E. Carlson.)

Were any of those marks made in this accident with Mr. Bellamy?

A. No, there wasn't any of them.

Q. You were going to what post office, Mr. Carlson? A. Redwood City post office.

Q. That is located about where? What streets?

A. It is on Jefferson Avenue between Broadway and Middlefield Road.

Q. Can you tell us about what time of the day the accident happened?

A. Well, not exactly the time; I'd say it was between 5:00 and 5:30, but I don't know exactly the time, because I didn't look at the clock at any time.

Q. How far do you have to travel on the road from your place where you work up to the place where this accident happened? Is that a matter of miles or is it a matter of feet?

A. From the cement plant to where the accident happened? [322B]

Q. Yes. A. It is over a mile.

Q. It is over a mile? A. Oh, yes.

Q. What is there in the way of plants, industrial plants between your Portland Cement place of business and where the accident happened? Are there any other businesses or plants out there?

A. Yes, there is quite a number of plants. There is the harbor, which have warehouses. There is the Standard Oil which has tanks, and Richfield Oil at that time—there is more now, but they was

(Testimony of Joseph E. Carlson.)

the only ones there at that time; then there is an asphalt plant, and then you come out to the Paraffine, and the Plant Rubber and Asbestos.

Q. With reference to traffic on that highway between your place of business and Bayshore Highway, was there very much traffic over that road around 5:00 to 5:30?

A. Yes, quite a lot of traffic. Most of the employees are going home. There is a lot of traffic over there.

Q. What about plant operations? Are there any plants out there that keep open after 5:00 o'clock?

A. Yes, Pacific Portland keeps open until midnight.

Q. What other plants? Do you know of any others?

A. Well, no, I don't. I don't know any oil companies, there are tanks coming in and out, but I don't know what time they [323] close.

Q. About the harbor itself, is it open all the time, or does it have a closing hour?

A. No, I think it is open all the time, because they haul gypsum out of there.

Q. Haul gypsum?

A. Gypsum that comes in on the boats is piled there in the harbor and trucks come in and pick that up.

Q. As you approach this area where the accidents happened, the road is on a curve, is it?

(Testimony of Joseph E. Carlson.)

A. Yes, that is right.

Mr. Phelps: Mr. Bledsoe, may I ask that your witness speak up? We can hardly hear back here.

The Court: Yes.

Mr. Bledsoe: Keep your answers up, Mr. Carlson, if you can, so that Mr. Phelps can hear you.

The Court: Mr. Bledsoe, it is 12:00 o'clock.

Mr. Bledsoe: This is a good time for that.

The Court: We will adjourn now until 2:00 o'clock this afternoon. Ladies and gentlemen of the jury, in the meantime, bear in mind the admonition that the court has heretofore given you. [324]

Afternoon Session

Monday, November 7, 1949, at 2:00 o'Clock

JOSEPH E. CARLSON

resumed the stand.

Direct Examination

(Continued)

By Mr. Bledsoe:

Q. Mr. Carlson, when you got to a point about in the right hand side of this diagram, which would be at the easterly end of the diagram, there is a shed off there to the north, is there, of some kind?

A. That is the Plant Rubber Warehouse.

Q. And when you reached that point on your way in with the mail on the day of the accident, about how fast were you traveling?

A. At that point about 25 miles an hour.

(Testimony of Joseph E. Carlson.)

Q. Now between that point and the time of the accident did anybody cross the road in front of you?

A. Yes, there were two men jumped off the head car and ran in front of me, crossed the road right in front of me.

Q. Did you change your speed any?

A. Yes, I had to put on the brakes at that time, at that point.

Q. And did you reduce your speed?

A. Yes, I kept on slow speed all the way around the curve.

Q. To about what speed did you reduce it at that time? A. About 15 miles an hour.

Q. Then you continued on in toward Redwood City in a westerly direction, did you? [325]

A. I did.

Q. Then after that occurrence did you notice a man hanging on a boxcar?

A. Yes, I seen a man hanging on a boxcar.

Q. State whether or not the train that he was hanging on was moving or standing still.

A. Moving very slowly when I was coming around the curve.

Q. Did you notice in particular which end of the boxcar he was on?

A. He was riding the end next to the engine.

Q. Right next to the engine. Can you tell us whether or not the train was on the main line

(Testimony of Joseph E. Carlson.)

tracks that run next to the highway or whether some of it was on the spur that runs——

A. No, it was all on the main line next to the highway.

Q. At least that was your observation of it?

A. That's right.

Q. Did you change the position or direction of your automobile at any time after you reached that shed or opposite that shed?

A. No, I cut close to the center all the way around the curve.

Q. What part of the highway were you driving on at the time you saw this man hanging on the boxcar?

A. I was still astraddle of the center line.

Q. You were straddling the center line?

A. Yes.

Q. By that do you mean that part of your car—— [326]

A. Part of my car was across the line.

Q. On the wrong side of the road?

A. That is right.

Q. Was that the position your car was in as you rounded the curve? A. That is right.

Q. What, if anything, happened after that? Will you describe to us just what happened and how the accident occurred?

A. Well, I was going along the course around the curve, and just as I got by this man hanging on the boxcar, I just got a glimpse out of the cor-

(Testimony of Joseph E. Carlson.)

ner of my eye of him letting loose, and then I felt a bump, and I came to an immediate stop.

Q. Did you actually see him come in contact with your car? A. No.

Q. You did see him start to swing off of the boxcar?

A. I did see him let loose, just caught a glimpse of him letting loose.

Q. And at that time what position was your automobile in with reference to him?

A. How do you mean?

Q. Well, was the front end of your car about up to where he was, or even with him?

A. Oh, the front end of the car I would say was past. I just got a glimpse out of the corner of my eye of him letting loose.

Q. At the time that that happened, how fast were you going? [327]

A. About 15 miles an hour.

Q. When you stopped your car, from the time you felt this bump until you stopped it, did you keep in the center of the highway or did you bring your car over to the right or left?

A. Oh, I kept in the same direction, the same.

Q. Did you remain seated in your car or did you get out? A. I got out immediately.

Q. Where did you go?

A. I went over to the man that was injured.

Q. Where was the man that was injured lying when you got there?

(Testimony of Joseph E. Carlson.)

A. He was lying right by the road where he got hit, with his head towards the harbor and his feet upon the engine, the running board of the engine; in fact, he put one foot up and then the other.

Q. That would be at the head end of the engine?
A. Head end of the engine.

Q. And his head was pointed somewhat toward the harbor, toward the east?

A. Pointed toward the harbor.

Q. What is your estimate of how far you traveled after you felt the bump until you stopped?

A. I estimate it about 25 feet.

Q. Did you take any measurements for yourself?
A. No, none whatsoever.

Q. Now, from the time that you stopped your car immediately after [328] the accident until police officers arrived, did you move your car at all?

A. No, I never moved it.

Q. Did anyone move it?
A. No.

Q. Can you tell about how soon the police officers came after the accident in minutes?

A. Oh, it would just be a guess; I should say eight to ten minutes.

Q. From the time the accident happened until they arrived?
A. Yes.

Q. Did they get there before the ambulance did or not?
A. No; they got there before.

Q. Did you, immediately after the accident and before you got out of your car, say to the engi-

(Testimony of Joseph E. Carlson.)

neer on the train that you were late and in a hurry to get to the post office with the mail?

A. I did not.

Q. Did you state anything like that to anybody there after the accident? A. No.

Q. Now, at the time you left your plant was your mail ready for you at the usual time, or was it late?

A. No, it was late that evening. It should be ready at 5:00 o'clock, but this night it was late.

Q. You fix the time of the accident between 5:00 and 5:30? [329]

A. Yes, that is what I guessed it.

Q. Did the engineer on the train say anything to you after the accident?

Mr. Phelps: Objected to as not binding on the defendant Southern Pacific Company. It wouldn't be within the course and scope of his employment to make any statement.

Mr. Digardi: We join in the objection; it isn't binding on the plaintiff in this action either, your Honor.

The Court: I will sustain the objection.

Mr. Phelps: Hearsay, self-serving.

Mr. Bledsoe: The objection is sustained to that, your Honor.

The Court: It seems to me that on the cross-examination of Mr. Edwards you did ask him a question——

Mr. Bledsoe: I asked him——

(Testimony of Joseph E. Carlson.)

The Court: —with respect to something you claim he said. I think you put that as a leading question. Then I will admit that, for the purpose of impeachment, not otherwise.

Mr. Digardi: If your Honor please, my recollection of the record is he might have made that statement with respect to what he might have said to the police officers. He laid a foundation for possible impeachment with the police officers, but not with this witness, your Honor. That is my recollection of it. [330]

Mr. Bledsoe: I think I asked this question of the engineer.

The Court: Put the question you ask with respect to what he said to Mr. Carlson, not with respect to what these other people said.

Q. (By Mr. Bledsoe): Did the engineer after the accident come to you and pat you on the back and say to you, "Don't feel badly; it wasn't your fault, and I hollered at the man"?

A. That's right.

Mr. Phelps: Same objection. It isn't binding on the defendant Southern Pacific.

Mr. Digardi: We object to that, that it is without proper foundation technically.

The Court: Your objection is overruled and the evidence is not admitted in any respect as binding on the Southern Pacific. The answer may stand. The answer was what?

A. Yes, he did.

(Testimony of Joseph E. Carlson.)

Q. (By Mr. Bledsoe): Did the police ask you questions about the accident?

A. Not many; they went through the routine checkup, driver's license, where did he hit, and a few——

Q. Well, they asked you questions about the accident, did they? A. Yes.

Q. Did you remain there until an ambulance came?

A. Yes, I was there until the ambulance came.

Q. After the accident had all been investigated and was all over [331] and the ambulance had gone with the injured man, did you go into Redwood City? A. I did.

Q. And did you mail the mail that you had with you? A. I did.

Q. Then when were you to go off duty that day?

A. That evening?

Q. Yes. A. At 8:00 o'clock.

Q. 8:00 o'clock. So you went back to the plant again, did you? A. Yes.

Mr. Bledsoe: I think that is all.

Cross-Examination

By Mr. Digardi:

Q. Mr. Carlson, how long did you say you have been employed by the Pacific Portland Cement Company?

A. Right up to the present time 18 years and 9 months.

Q. During that entire period has it always been at this same plant at Redwood City Harbor?

(Testimony of Joseph E. Carlson.)

A. That is right.

Q. So during this 18 years you have traveled back and forth over the same highway many, many times to and from work, at least every day or many times a day over that whole period, is that correct? A. Yes, that's right.

Q. And you stated also you had your hours of work, or did you, [332] were from 6:00 a.m. to 10:00 a.m. in the morning, and then additional hours in the evening?

A. It was a split shift, 6:00 a.m. to 10:00 a.m., 4:00 to 8:00 p.m.

Q. Did you punch a time clock at all?

A. No.

Q. Or were you just working roughly those hours?

A. That is my hours, and I had so much work; if I got through sooner I left before that.

Q. In other words, if you finished your work at night, if you finished earlier than 8:00 o'clock, you didn't have to wait around till 8:00 o'clock came to go home? A. No.

Q. The sooner you finished up work in the evening, the sooner you could go home, is that correct? A. That is right.

Q. And of course, as you stated, this particular night you were late, rather the mail was late for you; that is correct?

A. It was later than usual. Usually it was about 5.00 o'clock; this evening it was after 5:00.

(Testimony of Joseph E. Carlson.)

Q. You were also, Mr. Carlson, familiar with the fact that the railroad tracks ran alongside of this highway as is described on the diagram and shown in the pictures, particularly calling your attention to plaintiff's exhibit No. 31?

A. Yes, I am familiar with the highway. [333]

Q. And you are familiar with the fact that it runs right alongside the railroad track?

A. Absolutely.

Q. And you are also familiar with the fact that around 5:00, or at least that particular time every night the railroad men are switching boxcars on this particular track in the evening; that is the customary thing for them to be doing at this particular time of night, isn't that true, Mr. Carlson?

A. Well, not always, no.

Q. But you knew that they did?

A. More or less, some place on the line between that time and the time they go home.

Q. So you knew that these men were working in and about the highway at the particular time of this accident; isn't that a fact? A. Yes.

Q. And you also stated that as you were coming around the curve you saw two men that were connected with this railroad movement drop off and cross over the track? A. I did.

Q. So it was no surprise to you in any way when you found men working in and about the highway; isn't that a fact?

A. That is right.

(Testimony of Joseph E. Carlson.)

Q. Now, Mr. Carlson, approximately how far away from Mr. Bellamy were you when you first actually observed him? [334]

A. Just as I came around the curve I could see him hanging on the car.

Q. You could see him hanging on the boxcar as you were back here around the curve?

A. As I was coming around the curve, if you keep your eye on it continuously—more or less I was looking toward him, I could see him.

Q. You watched him, followed him, kept him in your line of vision from the time you first observed him coming around the curve until the time of the accident, is that correct? A. Yes.

Q. Then the next thing you knew, when the front end of your car had just about passed him, you got a glimpse of him out of the corner of your eye dropping off of the car, is that correct?

A. Yes.

Q. Then the next thing, you heard the thump?

A. No.

Q. Or felt the bump against your car?

A. I felt the bump on my car.

Q. And it was at that time that you first applied the brakes, is that correct? A. Yes.

Q. Mr. Carlson, I show you defendant's exhibit CC for identification and ask you if that is your signature?

A. That is my signature. [335]

(Testimony of Joseph E. Carlson.)

Q. Can you tell us—it bears the date April 6, 1949—

A. That is right.

Q. Was that approximately the date this was—

A. The morning of the 6th.

Q. I will hand you this. You can keep that in your hands, Mr. Carlson. Incidentally, have you read that statement recently?

A. No, not this one, no.

Q. When was the last time you read that particular statement?

A. A couple of weeks ago, I guess.

Q. A couple of weeks ago; was that your answer?

A. I think so, yes, sir.

Q. Are you sufficiently familiar with the contents that I could ask you questions concerning that, or would you like an opportunity to look it over now?

A. I think I know what is in here; I stated nothing but what is right.

Mr. Bledsoe: Put it in evidence if you want to, counsel.

Q. (By Mr. Digardi): Mr. Carlson, are you positive you saw Mr. Bellamy hanging on the side of the box car?

A. Absolutely.

Q. I call your attention to the second page of this statement and the fourth line from the bottom. Maybe it is on the back. I believe on that copy it is on the back of page 1. I call your attention to the language beginning with where I have my finger. Does it not state there, "I believe I noticed a man hanging on to the step"? Does it so state?

(Testimony of Joseph E. Carlson.)

A. That is what it says there, "I believe I noticed a man hanging on the step."

Q. When did you first determine that you actually *saw man* standing on the step of the box car? When did you decide that, Mr. Carlson?

A. I knew it all the time.

Q. Were you trying to mislead somebody when you gave this particular statement?

Mr. Bledsoe: I object to that as argumentative.

The Court: That is argumentative.

Q. (By Mr. Digardi): Who took that statement from you, Mr. Carlson?

A. The company investigator.

Mr. Bledsoe: I object to that on the ground it is incompetent, irrelevant and immaterial, who took it.

Mr. Digardi: I think it is very relevant who took the statement from him. If we had taken it, it would be quite different.

The Court: I will allow the answer.

Mr. Digardi: Who took the statement from you?

A. The company investigator.

Q. And does it not next state: "The next thing I realized was that I felt a bump"? Does it not so state following the language I just read? [337]

A. That is right.

Q. Does it say any place in the statement at all, Mr. Carlson, that you observed Mr. Bellamy drop off the side of the box car?

(Testimony of Joseph E. Carlson.)

Mr. Bledsoe: Objected to on the ground the statement speaks for itself.

The Court: The statement speaks for itself.

Q. (By Mr. Digardi): Mr. Carlson, you stated on direct examination that you kept close to the center of the highway from the first time you came around the curve and continued on the center line all the way and never changed your course, is that correct? A. That is right.

Q. Do you recall your deposition having been taken on the 1st day of September 1949 when you were in our offices with your counsel present?

Mr. Bledsoe: I will stipulate whatever you want to read, that he so stipulated at that time. Just read it.

Mr. Phelps: May it please the Court, we were not present at the deposition, so may it be offered as a matter between the Pacific Portland Cement and the plaintiff, not binding on the defendant Southern Pacific either as impeachment of their witness——

The Court: That is the fact. At this testimony the Southern Pacific representatives were not present; it is not binding on the Southern Pacific. [338]

Mr. Digardi: May it be stipulated, Mr. Bledsoe, that at that time and place the witness testified as follows: This is on page 6, beginning on line 2 of the deposition:

“Q. And when did you first see Mr. Bellamy?

(Testimony of Joseph E. Carlson.)

A. Well, I first seen him when I got practically to him, I seen him hanging on to the box car.

Q. And then what happened?

A. Well, I kept on; I pulled out towards the center of the road to get more room, not knowing what he was going to do."

Is that so stipulated?

Mr. Bledsoe: You didn't finish the sentence, counsel.

Mr. Digardi: Well, the other part——

Mr. Bledsoe: You didn't finish the answer.

Mr. Digardi: All right. "I was just going on slow around the curve, which I always slow down to. The first thing I knew I felt a bump on the truck."

Mr. Bledsoe: I will stipulate he gave that answer to that question.

Q. (By Mr. Digardi): Mr. Carlson, do you recall about an hour after the accident, when the members of the crew were switching cars in the cement plant after you had returned from your trip to the post office—do you recall that time?

A. I remember talking to them down to the gate.

Q. You went down to see—— [339]

A. I asked them to give me their names, because I had to make out a report to the company.

Q. That is correct. Now calling your attention to that particular time, Mr. Carlson, did you not speak to the conductor at that time and place, and

(Testimony of Joseph E. Carlson.)

did he not ask you how the accident happened and you stated to him——

Mr. Bledsoe: If the court please, we are going to object to this, because it is something that happened after the accident and apparently not part of the *res gestae*, so it would be something that wouldn't be binding on the defendant corporation.

The Court: That may be true. It may be in the nature of impeachment.

Mr. Digardi: It is that, your Honor. I am laying a foundation now for impeachment.

Mr. Phelps: Then, if your Honor please, an objection may go; as far as we are concerned it is not binding on the defendant Southern Pacific Company in any way; it is a matter between the Pacific Portland and the plaintiff.

Q. (By Mr. Digardi): Did you not state to the conductor at that time, in answer to a question as to how it happened, "Damned if I know, the first thing I knew that man was there in front of me"? Did you not so state? A. I did not.

Q. And did you not further state, "I know you work there every day"? [340] A. No.

Q. The fact is, though, that you did know that a train crew worked there every day, isn't that a fact? A. I did, yes.

Q. Isn't it a fact, Mr. Carlson, that you had been warned by various members of the railroad crews about the way you drove around these box

(Testimony of Joseph E. Carlson.)

cars and the men while they were switching box cars many times in the past?

Mr. Bledsoe: We will object to that as incompetent, irrelevant and immaterial.

The Court: Well, I think you ought to call his attention to the name of the person, don't you?

Mr. Digardi: Well, we will withdraw the question.

Q. Isn't it a fact, Mr. Carlson, that in particular one conductor by the name of C. D. Moore warned you many times about the way you drove around the spots where the men were switching box cars and in the highway?

Mr. Bledsoe: Same objection.

A. I don't remember.

Mr. Phelps: As to the defendant Southern Pacific Company may I enlarge upon the objection, that it wouldn't be binding upon the defendant Southern Pacific Company; it isn't part of the case in chief against the Southern Pacific, without notice to the Southern Pacific.

The Court: The answer was "no", anyway. [341]

Q. (By Mr. Digardi): Now a day or two after the accident, Mr. Carlson, were you present when some photographs were taken on behalf of the defendant of the scene of this accident?

A. No, I was not.

Q. You were not present at that time?

A. No.

(Testimony of Joseph E. Carlson.)

Mr. Digardi: I think that is all.

Mr. Phelps: I have no questions.

Mr. Bledsoe: No further questions, your Honor.

The Court: All right.

Mr. Bledsoe: We rest, if the court please.

The Court: Any rebuttal?

Mr. Digardi: We have one witness, your Honor,
Mr. Lechner.

GEORGE P. LECHNER

called as a witness on behalf of the plaintiff, in
rebuttal, previously sworn.

The Court: You have already been sworn, Mr.
Lechner. Just take the stand.

Direct Examination

By Mr. Digardi:

Q. Mr. Lechner, do you recall an incident about
an hour after the accident when Mr. Carlson came
and visited you and members of the crew to ascer-
tain the names of the members of the railroad train
crew? [342]

Mr. Phelps: There is an objection, if it may
please the court, as to any testimony in rebuttal.
We didn't put on any case. There is no occasion
for any rebuttal as to the defendant Southern Pa-
cific Company.

The Court: That is right. This only applies to
the other defendant, Pacific Portland Cement.

A. Yes, I recall.

(Testimony of George P. Lechner.)

Q. (By Mr. Digardi): Did you at that time and place ask Mr. Carlson how the accident happened?

A. Well, Mr. Carlson came to me at the shed there where we receive the switch lists, and he asked me if I could give him my name and the name of the engineer and the name of the injured man and the addresses, as he had to make out a report. And I so furnished Mr. Carlson with that information at that time. The crew was working down the line, that is, my crew, and he asked me these questions and after I gave——

Mr. Bledsoe: It is understood that this conversation we are objecting to it on the ground it is not part of the *res gestae* and would not be binding as evidence against my client.

The Court: All right.

Mr. Digardi: This is merely impeachment, your Honor.

The Court: I will overrule the objection.

Mr. Phelps: We rely upon the same grounds.

The Court: Yes.

The Witness: What do I do? Answer the question? What [343] was the question?

Q. (By Mr. Digardi): Did you ask him then——

A. Then after I gave him the information, I said to Mr. Carlson, I said, "I didn't see the accident. How did it happen?" And he said, "Well, I'll be damned if I know. First I know the man

(Testimony of George P. Lechner.)

was right in front of me, and I tried to miss him, but I guess I didn't."

Q. Did he say anything further with respect to the accident? I will withdraw the question.

State whether or not at that time and place he said to you, "I know you work there every day"? Did he state that?

A. Yes, he said—well, I think I said that to him, I said, "You know we work around there all the time, don't you?" He said, "Yes, I see you working there every day."

Mr. Digardi: I think that is all.

Cross-Examination

By Mr. Bledsoe:

Q. Mr. Lechner, you refused to give Mr. Carlson your address, didn't you, after this accident?

A. No, sir.

Q. Didn't you refuse to give the police a statement on this accident?

A. No, sir, the police never asked me for a statement of the accident.

Q. In that hour before you talked to Mr. Carlson, did you ask the members of your crew how the accident happened? [344]

A. I don't believe so, because after the man was removed to the hospital we were getting quite a bit late; we had to get to the cement plant and I had to then take part as a brakeman and help with the work so we finished the work at that plant spur, and then I called the brakeman to go back and get

(Testimony of George P. Lechner.)

the train, we would go on to the harbor, switch the cement plant, and then to the rest of the work and come down, so that we could get back in time. I caught my caboose and made out my report between the time we left the plant spur. I was back there all the time. I only had two men; they had to ride ahead and handle the boxcars.

Q. So you didn't know anything about this accident happened until you asked Mr. Carlson about it, is that right?

A. Well, as to that, I wouldn't want to swear under oath that I talked to him before I talked to any other member of the crew, but it seems to me that he was at the gate as soon as we got out to the cement plant, Mr. Carlson.

Q. You were at the scene when the police officers arrived, weren't you?

A. No, I went to phone. When I came back from phoning, the police officers and the ambulance were both there.

Q. They were both there when you got back from phoning?

A. Both the police officers and the ambulance, I think, had Mr. Bellamy on a stretcher getting ready to put him in the ambulance. [345]

Q. Where did you go?

A. I went into the old Plant warehouse.

Q. Did you phone to anyone besides the police and the ambulance?

(Testimony of George P. Lechner.)

A. Yes, sir, I phoned the chief dispatcher in San Francisco at the Southern Pacific Company to notify him that I had ordered an ambulance and that the injured man was being taken to the nearest hospital.

Q. While the police and you were there, you knew the police were investigating the accident, did you not? A. Why, yes.

Q. And in the course of that investigation while you were there and the police were there, didn't anybody make any explanation how the accident happened?

A. I asked the police officer, and he said—the police officer at the time said, “I have to make out a written report of this accident,” and he didn't give me any facts. I said, “I have to have some facts for my report.” And he said, “Well, this report will be filed at the Redwood City Police Department, and your company can get the facts from there after I write it up, so he wouldn't give me any information.

Q. Mr. Edwards,—did he refuse to give you any information? A. No.

Mr. Bledsoe: That is all. Thank you.

Mr. Digardi: No questions.

Mr. Phelps: No questions. [346]

Mr. Digardi: The witness may be excused.

The plaintiff rests, your Honor.

Mr. Phelps: We have some matters to take up with the court.

The Court: All right; the jury will be taken to the jury room.

Before you go, ladies and gentlemen, bear in mind the admonition I have heretofore given you.

(The following proceedings were had out of the presence of the jury.)

MOTION FOR DIRECT VERDICT

Mr. Phelps: May it please the court, at this time, on behalf of the defendant Southern Pacific Company, I move that a verdict be directed in favor of the defendant Southern Pacific Company pursuant to the appropriate rules of the Federal Rules of Civil Procedure, and particularly Rule 50.

* * *

The Clerk: Should the record also show that Mr. Bledsoe has made a similar motion and that it has been denied?

Mr. Bledsoe: I was going to request that I might make a motion for a directed verdict on the same grounds.

The Court: On all of the grounds that you made on your motion for a dismissal?

Mr. Bledsoe: Yes, your Honor.

The Court: And on all of the grounds that were made by Mr. Phelps which are available to you?

Mr. Bledsoe: Yes, your Honor.

The Court: And any grounds stated in your argument?

Mr. Bledsoe: Yes, your Honor.

(At this point the jury was brought into the court room.) [352]

The Court: Ladies and gentlemen, there are some matters which counsel are discussing with me which we concluded will take longer than a few minutes, and we don't want to keep you waiting. In addition to that, I have contracted a very heavy cold, and as it is likely the discussions will take until after three, I thought it better that we not keep you waiting and let you go until tomorrow morning. I hope that is satisfactory to you. When we adjourn, we will adjourn until tomorrow morning, as far as the jury is concerned, at 9:30 in the morning, if that is satisfactory to you. You may be excused until that time. In the meantime, bear in mind the admonition of the Court heretofore given you.

(Whereupon the jury retired from the court room.)

The Court: Gentlemen, under the rule I am required to advise you in a general way of the nature of my instructions so that you can base your arguments upon them. [353]

* * *

We will adjourn until tomorrow morning at 9:30.

(Thereupon an adjournment was taken until Wednesday, November 8, 1949, at 9:30 o'clock a.m.) [365]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28909-E

Before: Hon. Herbert W. Erskine,
Judge.

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and PACIFIC PORTLAND CEMENT
COMPANY, a Corporation,

Defendants.

REPORTER'S TRANSCRIPT
INSTRUCTIONS TO THE JURY

November 9, 1949

Appearances:

For the Plaintiff:

ROBERT R. HEPPELLE, ESQ., and
EDWARD DIGARDI, ESQ.

For Defendant Southern Pacific Company:

LOUIS PHELPS, ESQ.

For Defendant Pacific Portland Cement
Company:

LEIGHTON BLEDSOE, ESQ.

Morning Session

Wednesday, November 9, 1949, at 10:00 o'Clock

The Clerk: Case of Bellamy vs. Southern Pacific Company and Pacific Portland Cement Company, further trial.

The Court: Ladies and gentlemen, the presentation of the evidence in this case has been concluded. You have listened to the argument of counsel. Let me say to you first of all that it is your exclusive province to judge the facts of this case. It is the exclusive function of the court to instruct you as to the applicable law, which in turn you should apply to the fact. I express no opinion as to the facts of the evidence, nor do I wish you to understand or conclude from anything I may have said during the trial or during the course of these instructions that I have intended, directly or indirectly, to indicate any opinion on my part as to the facts or as to what I think your findings should be. Ladies and gentlemen, you and you alone must decide the facts.

In your deliberations you must wholly exclude any sympathy or prejudice from your minds. Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively is a matter for your sole and exclusive judgment.

A witness is presumed to speak the truth, but this presumption may be negated by the manner in which he testifies, by his motives, or by evi-

dence as to his character, reputation for truth and honesty and integrity. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony, or discard or reject the whole or any part thereof. If it is shown that a witness has testified falsely on any material matter, you should distrust his testimony in other particulars; and in that event, you are free to reject all of that witness' testimony.

This being a civil action, the plaintiff has the burden of proof. A preponderance of the evidence is sufficient to sustain that burden. By a preponderance of the evidence is meant that the testimony on behalf of one party has greater weight and more convincing weight than that of another party. If equally balanced, it does not necessarily depend upon the number of witnesses testifying, but rather upon the character of the testimony with reference to its *probably* truth or falsity. In determining the preponderance of the evidence, it is your duty to scrutinize carefully the testimony given, and in so doing, consider the following: A, the circumstances under which the witness testified; B, his demeanor and manner on the stand; C, his intelligence; D, the connection or relationship which he bears to either party; E, the manner in which he might be affected by the verdict; F, the extent to which he is contradicted or corroborated by the other evidence, if at all; and G, any other matter which reasonably sheds light on the credibility of the witness.

You must disregard entirely any testimony stricken out by the court or any testimony to which an objection has been sustained. The attorneys, in their arguments, have commented and argued upon the facts; if you find any variance between the facts as testified to by the witness and what has been stated to you by the counsel to be the facts, to the extent of such variance you must consider only the facts as testified to by the witness.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of the evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of one witness.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point.

In questions asked of you concerning your qualifications as a juror, some mention was made of the matter of insurance. I instruct you, you cannot bring in a verdict against any insurance company. I further instruct you that no insurance company is a party to this proceeding. I instruct you that it would be contrary to your oaths as jurors to

discuss either collectively or individually the subject matter of insurance. That is not and cannot be an issue in this case, and has no relationship whatever to any issue or question. This case must be decided by the jury entirely under the facts and law, and your verdicts must not be influenced by any other consideration whatsoever.

While there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The rules of law applicable to the defendants are somewhat different, and these differences will be pointed out to you in the ensuing instructions. However, the gist and gravamen of plaintiff's action is based upon the claim that each of the defendants was negligent, so I will first give you the law respecting negligence.

The plaintiff must prove negligence, or there can be no recovery. The defendants are not insurers, they are not to be held responsible simply because there was an accident and injury, if that was without fault on their part. Nor is a railroad defendant liable simply because there may be some danger in connection with the normal and customary railroad operation. Nor is it enough to show only that if the defendants had acted in some different way, different from the way in which they did act, the accident might not have happened. To the contrary, you cannot find against defendant unless the plaintiff proves two things by a preponderance of the

evidence; first, that there was negligence in a particular charge in a complaint, and second, that such negligence, if any there was, was the proximate cause of the accident.

A defendant does not have the burden of proving freedom from negligence. To the contrary, the burden of proving negligence is on the party who charges it; and in this case, as to any claimed negligence of a defendant, unless the plaintiff sustains the burden of proving it by a preponderance of the evidence, the verdict must be in favor of such defendant. Negligence is the omission to do something which an ordinary, prudent person would have done under the circumstances, or doing something which such person would not have done under the same conditions. It is not absolute or intrinsic, but always relates to some circumstances at some time, place, or person.

By ordinary care is meant that degree of care which an ordinary, careful and prudent person would have exercised under the same or similar circumstances; and the failure on the part of any person or corporation to exercise that degree of care is negligence. Negligence may be active or passive in character, and in order to establish negligence, it is not incumbent upon the plaintiff to prove that the defendant intended to commit the injury he complained of.

I have also mentioned to you that the plaintiff may not recover unless it is shown that some negligence or failure on the part of the defendant

charged proximately caused the injury to him. The term "proximate cause" is defined to mean that which, in the natural, continuous sequence, unbroken by any new independent cause, produces the event, and without which that event would not have occurred. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case each of the participating acts or omissions is regarded in law as a proximate cause. When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contributed concurrently and as proximate causes to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution.

You are instructed that a corporation is an artificial person, a creature of the law. It must necessarily act through its servants and agents and employees. An act of an employee within the scope of his employment or in the course of his employment is an act of his employer, and the negligence of the employee in the performance of his duty is the negligence of the employer.

In instruct you that in deciding questions of negligence and contributory negligence, you must not permit yourself to be influenced in the slightest

degree in your duties as jurors by sympathy, passion or prejudice. The questions of negligence, of contributory negligence, are necessarily questions of fact, and they must be decided, considered and judged by you without sympathy or any other emotion influencing your mind in any manner whatever.

While it is incumbent upon the plaintiff to prove his case by a preponderance of evidence, the law does not require of the plaintiff proof amounting to a demonstration or beyond a reasonable doubt. All that is required in order for a plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests. I instruct you that if, after the consideration of this whole case and the instructions of this court, your minds are in doubt or uncertainty as to the negligence of either of the defendants, or if you believe that the evidence is equally balanced as to either of the defendants or both of them, then it is your duty to render a verdict in favor of the defendant, or both of them, as to which the evidence is so equally balanced.

You cannot return a verdict against either of the defendants merely because an accident happened and an injury resulted from it. The mere happening of an accident raises no presumption or inference of negligence on the part of a defendant. The plaintiff has the burden of proving by a preponderance of evidence that the defendants were guilty

of negligence which proximately caused the injury complained of. Sometimes accidents happen and persons are injured where there is no fault on the part of any party involved in the accident. Such accidents are called inevitable or unavoidable accidents. If you find that the accident out of which this case arises was an unavoidable accident, then the plaintiff is not entitled to recover anything and your verdict must be against the plaintiff and in favor of the defendants.

The issue of contributory negligence on the part of the plaintiff has been raised in this action by defendants. Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring 'with' such negligence and proximately contributing to the injuries sustained by such person. Ordinarily the burden of proof rests upon the defendant charging contributory negligence on the part of the plaintiff to prove by a preponderance of the evidence such contributory *evidence*. The exception being when the testimony offered by or on behalf of the plaintiff shows and establishes such contributory negligence. In other words, the burden of proof as to contributory negligence is met if the same is established by the preponderance of the evidence in the case, regardless of whether such evidence was introduced by the plaintiff or by the defendant or by both.

I will now give you the rules of law applicable to the issues raised by the pleadings between the

plaintiff and the defendant Pacific Portland Cement Company, which, for the sake of brevity, I will hereafter refer to as the Cement Company. It is part of the duty of the operator of an automobile to keep his machine always under control, so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the defendant Cement Company's driver in the operation of the automobile he was driving. And if you believe from the evidence that at the time and immediately before the collision in question, he did not keep the automobile under control, so as to avoid colliding with the plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent.

You are instructed that at the time of the accident there was in effect section 510 of the California Motor Vehicle Code, providing "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway; and at no event at a speed which endangers the safety of persons or property." Under this statute it was one of the duties of the Cement Company's driver in the exercise of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and particularly those the performance of whose duties require them to

be thereon. If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, then and in that event the said driver was negligent. And in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight; for to look is to see, and in such circumstances, you must necessarily find that the defendant's driver either failed to look, or having looked, did see the plaintiff *is* such a position.

A person who himself is exercising ordinary care has the right to assume that others too will perform their duty under the law. And he has a further right to rely and act upon that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from the violation of law or duty by another.

In its answer to plaintiff's complaint, the defendant Cement Company has denied negligence on its part and has alleged as an affirmative defense that the plaintiff, William A. Bellamy, was guilty of contributory negligence. If proved, this defense of contributory negligence is a complete defense to this action as against the Cement Company. It is the law of this state that if the plaintiff, William A. Bellamy, was guilty of any negligence which amounted to a want of ordinary care, and which proximately contributed to the accident and his

resulting injuries, he cannot recover damages from the Cement Company. This is true regardless of how slightly such negligence on the plaintiff's part may have contributed. It is also true regardless of whether or not the defendant Cement Company or its driver was negligent, or how negligent he or it may have been. The law does not permit you to weigh the amount of negligence, if any, as between the plaintiff and the defendant Cement Company. That is to say, the law is not concerned with how negligent either party may have been, if both were negligent and such negligence proximately contributed to the injuries of the plaintiff. Or stated in another way, the plaintiff cannot excuse any negligence of his own on the ground that the defendant Cement Company or its driver was also negligent, or on the ground that the defendant or its driver was more negligent than the plaintiff. If you find from the evidence that the plaintiff was guilty of any negligence amounting to a want of ordinary care which proximately contributed to the accident in question and his resulting injuries, your verdict must be for the defendant Cement Company. You are instructed that contributory negligence, should you find it to exist, is a complete defense and will bar any recovery of any damages against the Cement Company.

In this connection, the defendant Southern Pacific Company is in a different situation, and you should distinguish carefully between the rules of law applicable to each defendant in connection with

this defense. In other words, contributory negligence is a complete defense, if you find it to exist, insofar as the Cement Company is concerned.

If you find from the evidence that the plaintiff was crossing a road at a point other than within the crosswalk, that plaintiff did not have the right of way, you are instructed that section 564 of the Vehicle Code of the State of California, in force and effect at the time of this accident, provides as follows:

“Pedestrian to walk on the left side of the roadway. No pedestrian shall walk on any roadway outside of a business or residential district, otherwise close to the left hand edge of the roadway.”

It was the duty of the plaintiff, William A. Bellamy, to use reasonable care, to look for vehicles on the road before he attempted to use it. This duty is not fulfilled by looking and failing to see that which is readily and clearly visible; when to look is to see; and the mere statement that one did look and could not see will be disregarded as testimony.

I instruct you that if there are two ways of performing an act, one of which is dangerous and the other is safe, a person who, with knowledge of the danger and the existence of both of the ways, voluntarily chooses the perilous one, is guilty of negligence. You are instructed, a person crossing a highway in front of an approaching vehicle cannot close his eyes to danger, if any, in reliance upon the presumption that the other party will use reasonable care and prudence and obey the traffic laws.

You are instructed that a pedestrian who attempts to cross a highway at other than a regular crossing place must exercise greater precaution than at an established crossing, and the observance of due care under such circumstances is not fulfilled by merely looking to the left and the right as he steps upon the highway. He must exercise that care during all the time that he is crossing. It is the duty of a pedestrian on a highway, as the act of an ordinary, prudent person, immediately before placing himself in a position of danger, to look in the direction from which danger, if any, is to be anticipated. This is a continuing duty and is not met by looking once and then looking away. A motorist exercising ordinary care has the right to assume, until there is evidence to the contrary, that a person on the highway will exercise his faculties and use reasonable care for his own safety.

You are instructed that negligence is not based upon the possibility of avoiding an accident. Mr. Carlson, the driver, cannot be charged with negligence simply because he might have avoided the accident had he acted differently. If that driver did all that an ordinary prudent person would do under the circumstances to avoid the accident in question, said driver is not chargeable with negligence, and the defendant Cement Company is not liable.

There is no presumption which the operator of an automobile is required to indulge when driving over the public highways, that persons alongside

the highway in front of him will not exercise the care requisite to their own safety, or that such persons are without intelligence and discretion enough to do so in the absence of any evidence to the contrary. A motorist who is himself exercising ordinary care has the legal right to assume that pedestrians ahead of him or persons about to become pedestrians upon the highway are intelligent enough to know that it is their duty while so using the highway to exercise the amount of care necessary for their own safety, and that they will do so. Such a motorist may assume, until the contrary may appear to him, that others using the highway, or about to use the highway, will exercise the care required of them under the circumstances.

If the jury finds that the plaintiff appeared on the roadway in such a manner as to constitute a confusing emergency, the driver of the vehicle, if proceeding with ordinary care, was not required to exercise the highest degree of care to avoid a collision, but only to exercise ordinary care. I instruct you that if Mr. Carlson, the truck driver, without any negligence on his part, was faced with a sudden peril or imminent danger to another, where immediate action was necessary, he would not be required to exercise all that presence of mind and care which is justly expected of an ordinary prudent man under ordinary circumstances.

The speed of any vehicle upon a highway not in excess of the limits specified by the California Vehicle Code or established as authorized in the

said code is lawful unless proved to be in violation of the basic rule declared in section 510 of the Vehicle Code, which has already been read to you. The *prima facie* speed limit outside a business or residential district, unless being posted to the contrary, is 55 miles per hour. In this connection you are instructed that the area where this accident occurred was not signposted for any speed limit at the time of the accident.

A driver of a motor vehicle is not required to sound a horn unless and until it reasonably appears necessary. When it is not reasonably necessary to insure the safe operation, the law requires that a horn shall not be used, but what may be reasonably necessary depends upon the circumstances of each particular situation. If you find the sounding of a horn would not have been heard above the noise of the train, or that the sounding of a horn would have made no difference in the happening of the accident, then you are instructed the failure, if any, to sound a horn, would not be a proximate cause of the accident.

In this connection plaintiff claims he was a workman on the highway, and that his duties required him to take the position on a highway where he was when the accident befell him. If you find from the evidence that the plaintiff was required by his duties to be upon the highway at the time he was injured, then I instruct you that the standard of care required of him was that required of a reasonably prudent person whose duties required him to be

upon the highway; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. In other words, persons who are required by their work to be on a highway are not considered legally in the same light as ordinary pedestrians, because they are engaged in an occupation which requires them to be on the highway, the degree of care required of them is less than that required of an ordinary pedestrian. But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway.

I instruct you that before you can return a verdict in favor of the plaintiff and against the Cement Company, you must first find by a preponderance of evidence that the defendant's employee, J. E. Carlson, was negligent, and that his negligence, if any, was the direct and proximate cause of the happening of the accident. In other words, you cannot return a verdict against the Cement Company, the defendant, unless you first find that there was no

contributory negligence and that some employee of that company was negligent, and that his negligence, if any, proximately caused the accident.

In connection with the defense of the defendant Cement Company, there is another issue which you must resolve in favor of the last mentioned defendant, or against it. In order for the plaintiff to recover in this court against the Cement Company, the burden of proof is upon him to show by a preponderance of evidence that at the time of the commencement of this action, on June 7, 1949, the plaintiff was a citizen of the State of Georgia and not of the State of California. This court is a court of limited jurisdiction. It has no jurisdiction over controversies between citizens of the same state. If the plaintiff in an action of the kind involved in this case between him and the Cement Company has failed to show you by a preponderance of the evidence that at the time of the commencement of the action he was a citizen of the State of Georgia, then your verdict must be in favor of the Cement Company. For purposes of federal jurisdiction, the term "citizen" means the same thing as "domicile." Plaintiff is a citizen of the state in which he was domiciled. Domicile consists of two elements: an act and an intent. Residence in a certain place with intent to remain there permanently. A person may temporarily change his abode from one state to another without the intention of remaining permanently in the latter state, but with the intent to return to his original residence. Under such cir-

cumstances the law does not regard his domicile as having been changed. On the other hand, if he changes the place of his abode to another state with intent to remain in the new residence, or forms such intent after he has changed his place of residence, then he ceases to be domiciled in the state from which he moved and is no longer a citizen thereof. Mere intention cannot effect a change of domicile. Nor is mere residence in a new state sufficient. But the intention to remain, coupled with the actual act of residence establishes the domicile, notwithstanding a floating intention to return to the former domicile at some future time. If a person has actually removed to another place with the intention of remaining there permanently, or for an indefinite time, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return to his former domicile at some indefinite future period. The mere fact that one is registered to vote in a certain place is not conclusive evidence upon the question of his domicile. Such a circumstance may be offset by other circumstances, such as, the said person is an unmarried man, unattached by domestic or family ties, is engaged in business or employment in a state other than that in which he is registered to vote, and has continued for several years in such state.

I will now come to the rules of law applicable to the other defendant, the Southern Pacific Company. As has already been stated to you, this is a suit, as far as the railroad company is concerned, under the

Federal Employers' Liability Act. We have in the State of California a law that applies only in the State of California, and that is the Workmen's Compensation Act. By that statute, irrespective of the negligence of an employer, every employee, if he is injured in the course of his employment, except because of his own misfeasance or misconduct, is entitled to compensation. He does not have to show under that statute that there was any fault on the part of his employer. The Federal Employers' Liability Act, however, applies all over the United States, wherever there is interstate commerce involved, which is the case here. And by this statute a right is given to an employee of a railroad company to recover in a court of the United States or of a state, damages, in the event that he has been injured in the course of his employment by any negligence on the part of his employer. And when I speak of negligence on the part of the employer, I mean the employer or any agent or employee of the employer, because in this case, a corporation or company can only act through agents or employees. And so if an employee suing under the Act shows negligence on the part of another employee of the company acting within the scope of his employment, it is the negligence of the employer or the corporation itself.

This Federal Employers' Liability statute, among other things, provides that a railroad carrier shall be liable in damages to an employee who suffers injury resulting in whole or in part from the negli-

gence of any officer, officers, agents or employees of the carrier, or by reason of any defect or deficiency due to such negligence in its cars, engines, appliances, machinery, tracks, roadbed, works or other equipment. Under this statute recovery can be made by the employee even if he himself has been guilty of some negligence, unless his negligence is the sole and only cause of the accident or injury which he suffered.

In a case of this sort the defendant Southern Pacific Company is entitled to rest its defense on the evidence introduced by the other party to the action, and to do so without itself calling any witness or introducing any evidence. And if it does so, you must not draw any inference unfavorable to the defendant Southern Pacific because it does not call witnesses or introduce evidence. All of the evidence in this case is available to the defendant Southern Pacific Company, and it is entitled to rely on the evidence introduced by other parties as fully as though it had introduced that evidence itself. And if that evidence shows no liability on its part, it will be your duty to return your verdict in accordance with that evidence; and if you so find, return a verdict in favor of the defendant railroad company.

Even if the plaintiff was injured at the time and place specified in his complaint and in the course of a switching operation, that alone does not entitle him to an award of damages. Even if he was so injured, he is not entitled to recover unless he

proved by a preponderance of the evidence all the factual elements necessary for recovery under the law, as I shall give and have given to you in these instructions. Plaintiff is not entitled to recover, even if he was injured while working on the job, merely because he was engaged in the course of employment at the time he was hurt. I have called your attention to the provisions of the Federal Employers' Liability Act dealing with responsibility of the employer for injuries to employees resulting in whole or in part from the negligence attributable to the employer. You must not be misled by this language in whole or in part. It does not mean that any negligence on the part of the employer, if there is any, however remote from the accident and injury complained of, is sufficient to impose liability upon the employer. To the contrary, before responsibility for negligence can be imputed to the employer, the plaintiff has the burden of proving that such negligence was more than a mere condition or remote cause of the injury complained of, and proving that it was the proximate cause of such injury.

Insofar as there is any question of care used by the Southern Pacific Company and its employees in the operation of the railroad here, they were not required to exercise the utmost degree of care which the human mind is capable of exercising. Nor were they required to exercise a greater degree of care than was required of any individual engaged in the same business. All that was required was the exer-

cise of ordinary care, such care as an ordinary prudent person would exercise, consistently with the practical operation of the railroad and in the same circumstances.

The person whose conduct we set up as a standard by which to measure the conduct of a defendant and its employees is not the extraordinary, cautious individual, nor the exceptionally skillful one; but simply a person of reasonable and ordinary prudence. The law does not demand of a defendant or of any of its employees exceptional or extraordinary or unusual skill or caution, but requires only ordinary care in operating its locomotives and trains along its tracks. Nor were they required to take steps against any unanticipated eventualities and happenings which were not reasonably to be foreseen.

If, however, there is any negligence on the part of the employee, and it is not the sole cause of the accident but is merely a contributing cause of the accident, the employee may still recover against his employer if he has shown that there was negligence on the part of the employer which proximately caused or contributed to his accident. In that event you will endeavor, if you so find, to determine the proportion of the contributory negligence of the employee, if any, and then you will deduct that percentage from the total amount of damages, if any, that you find the plaintiff is entitled to receive. That is the rule with respect to the railroad company. In other words, in the event

you find there was any contributory negligence on the part of the plaintiff in this action, then you cannot find the defendant Cement Company liable, but if you find there was any contributory negligence on the part of the plaintiff in this action, insofar as the railroad company is concerned, and if you find the railroad company was guilty of any negligence, then it is your duty to determine the proportion of the contributory negligence of the plaintiff, if any, and to deduct that percentage from the total amount of any damages, if any, which you find the plaintiff is entitled to, so far as the Southern Pacific Company is concerned. You should also bear in mind that under this law, the Federal Employers' Liability Act, the employee does not assume the risks of his employment. Simply stated, it means that there is no assumption of any risk under this law. So that it is not proper to withhold the judgment, holding the employer liable, if it appears that he is liable, because of any appearance or assumption of risk on the part of the employee.

The railroad company in this case was under a duty to exercise ordinary care, to furnish its employees with a reasonably safe place to work and reasonably safe methods of doing the work under the circumstances of the particular case. That means that here there was an obligation on the part of the railroad to furnish a reasonably safe place to work and a reasonably safe method of doing the work to its employees; and the plaintiff had a right to assume that the railroad company fulfilled

that obligation. I have told you that the plaintiff may only recover if by a preponderance of evidence he shows that by some negligent act of the employer, the Southern Pacific Company here, a reasonably safe place to work or a safe method of doing the work was not furnished, or that some negligence of some other employee or agent caused the injury. The mere fact, if it be a fact, that the railroad operations being carried on at that time and place the plaintiff was injured were accompanied by risks and hazards of injury to men working about there does not, of itself, show negligence on the part of the Southern Pacific Company. If the Southern Pacific Company exercised ordinary care in the conduct of its business and the operations in question, it was not negligence on its part to engage in and to continue such operations, exercising such care, even in the face of risks, hazards and dangers, if such there were, necessarily and unavoidably inherent in such operations so conducted. And if, as a result, and in such circumstances, and in the course of operations so conducted, an employee was injured as a result of such a risk, hazard or danger, responsibility for his injury cannot be imposed on the defendant Southern Pacific Company on that account. In other words, a railroad cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment, which cannot be eliminated by the carrier's exercise of reasonable care. The mere fact, if it be a fact, that the plaintiff received an injury

while acting as a brakeman, creates no inference, presumption of any negligence, or fault on the part of the railroad company. If the plaintiff got off a railroad car in a place of safety and thereafter, without taking any care for his own safety, left that place and went to a place of danger on the highway, and if doing so, he was guilty of negligence which was the sole proximate cause of his injury, your verdict must be in favor of the defendant railroad company. If the plaintiff, Mr. Bellamy, went upon the highway in such circumstances that he could exercise ordinary care for his own protection, and by the exercise of such care could have protected himself from injury, and was injured because he did not do so, then it would not constitute negligence on the part of the Southern Pacific Company if it is reasonably assumed that plaintiff, by exercising ordinary care, could protect himself from all hazards, injuries and failures to provide some other person to look for approaching automobiles, to do those things which the plaintiff could and should have done for his own protection. It would not constitute negligence on the part of the Southern Pacific Company, and would not constitute proof that it had failed to provide a reasonably safe place to work.

If the employment of an employee of the Southern Pacific calls upon him to be upon a public highway temporarily for the purpose of crossing it or otherwise, that fact, as a matter of law, does not constitute negligence on the part of the em-

ployee or the Southern Pacific Company. If the defendant Southern Pacific Company was in the exercise of ordinary care, and so long as it exercised that care, it was entitled to assume that neither the plaintiff nor the Cement Company would be guilty of negligence; and until put on notice to the contrary, was entitled to act on that assumption. And if it did so, that did not constitute negligence or impose liability upon it. If, when the plaintiff was on the highway, he was in a place of danger, and if that was a place of danger only because a truck of the Cement Company was negligently operated along the highway, if you so find, and but for such negligence, if any, there would have been no danger, responsibility for such negligence of the defendant Cement Company, if any, cannot be imputed to the defendant railroad company. And if the defendant railroad company could not reasonably anticipate such negligence, if any, in the driving of the truck, its failure to do so cannot impose liability upon it. If, in all the circumstances of this case, the plaintiff was entitled to assume that he could go on the highway without being struck by an automobile or other motor vehicle, the defendant Southern Pacific Company was entitled to make the same assumption, since there was no evidence in this case that it had any notice or knowledge which the plaintiff did not have.

If the conductor in charge of the railroad movement at all times with which we are concerned was in plain sight of the railroad engine, if the con-

ductor were in a position to give any necessary signals to control the movement, then, even if the plaintiff Bellamy did not know this fact and because of that went out to the highway, that did not excuse the exercise of care by him; and if he was ignorant of the position of the conductor by the failure to exercise such care, responsibility for that cannot be imputed to the defendant railroad company. If the plaintiff Bellamy was experienced in and familiar with the work he was doing, and knew and appreciated normal risks and hazards which attended it, including chance of injury in some moving vehicles on the road adjacent to the railroad tracks, the defendant railroad company was not required to take steps to protect him against those risks and hazards as did not result from its negligence, which were normal and customary risks and hazards of the employment which were known to and appreciated by him, and which he himself could have avoided by the exercise of reasonable care for his own safety. The law presumes, and the defendant railroad company and its employees were entitled to presume and assume, according to the ordinary course of nature and the ordinary habits of life, that a person possessing normal faculties of sight and hearing would see and hear that which was in the range of his sight and hearing. The men conducting the railroad operation were also entitled to presume and assume, until put on notice to the contrary, if that is the fact, that any person who might be within the possible range of those opera-

tions was a person possessing normal faculties of sight and hearing.

If the plaintiff Bellamy was an experienced workman and could have done his work in safety by the exercise by him of that care which an ordinary prudent person would have used in the circumstance, then in the absence of such notice to the contrary, the defendant Southern Pacific Company was entitled to assume that he would use that care, that no injury would result to him as a result of his own conduct; and it was not necessary for it to do so, nor was the defendant Southern Pacific Company required to take special steps to warn or protect him from the result of his own act.

During all the time he was working, and at the time he was injured, the law imposed upon the plaintiff the duty to exercise reasonable care for his own safety. The defendant Southern Pacific Company owed him no duty to exercise a higher degree of care for his safety than he himself owed. He was required to exercise reasonable care to protect himself from injury from the ordinary hazards and dangers of his employment, not resulting from negligence, and to protect himself from injury from such hazards, however and whenever they might be encountered. There is nothing in any of the circumstances of this case which suspends that duty, which relieved him from performing it or excused a violation of it, if any. If the plaintiff Bellamy failed to perform the duty which the law imposed upon him, he was guilty of negligence.

You have been instructed as to the effect of contributory negligence on the part of Bellamy, and that if he was hurt as a proximate result of any negligence on the part of his employer, his contributory negligence as to it is not a complete defense, but is only a defense in the reduction and mitigation of damages. You must not be misled or confused by that instruction. It does not mean that negligence on Bellamy's part, if any, cannot be a complete defense in this action. To the contrary; if Bellamy was guilty of negligence and if that negligence was the sole proximate cause of injury to him, his negligence is a complete answer to this action and it will be your duty to return your verdict in favor of the defendant Southern Pacific Company.

Each defendant in this case is entitled to have its defense given separate and independent consideration. You may find in this case that one defendant was guilty of negligence which was the proximate cause of injury to the plaintiff, while the other was not; or that both of them were not. If you find that one was guilty of such negligence, your deliberations should not stop there, and you should not thoughtlessly conclude for that reason that a verdict should be rendered against both.

The defendant railroad, in engaging in railroad business and in operating a railroad, was engaged in a legitimate and lawful business, and in considering the claims made by the plaintiff, and in the suit here, you should bear in mind that the defend-

ant railroad company is entitled to the same consideration at your hands as any individual engaged in any other form of business. If you believe from the evidence and from the instructions of the court that one or the other of said defendants or both were not guilty of the negligence charged, then you have no right to compromise the question of liability of such defendant or defendants and award the plaintiff damages against such defendant or defendants, merely because he was injured on the occasion in question. If you believe either defendant was not negligent as charged in the complaint, then you will have no occasion to consider at all the question of damages insofar as such defendant is concerned. You must, if you so find, return a verdict against the plaintiff and in favor of such defendant.

In your consideration of this case, and in determining whether or not damages are to be given, you must not permit yourself to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. Such feelings and emotions, however proper in themselves, have no just place in the consideration by you of this kind. In making your determination of the case, you cannot in any measure substitute prejudice or feelings of sympathy as a basis of an award. That is, for evidence as the basis of an award. Nor can you make a finding against the defendants, based upon mere guess, speculation, or conjecture. You must make your determination only upon the consideration of the

evidence before you and the instructions which have been given to you by this court.

In this case it is the duty of the jury first to ascertain whether or not there is any liability upon a defendant or either of them. The question of damages is not to be considered for any purpose by the jurors in the jury room until they have first decided whether or not any defendant is liable. Damages can only be awarded if there is a liability on a defendant under the facts and under the law. Therefore, the jury is admonished to first consider and decide the question of liability. If that question is decided in favor of the defendant, the jury will have no further purpose or concern to deal with damages insofar as that defendant is concerned. If you find that the plaintiff did, on the day in question, suffer an injury or injuries proximately caused by the negligence of the defendants or either of them, then you are entitled to bring in a verdict in his favor as to such negligent defendant or defendants. If you decide that in favor of the plaintiff, then the next thing you are required to determine is as to what, if any, damages, plaintiff is entitled.

In cases of this sort it is customary for the complaint to allege an amount of damage claimed. There are such allegations here. These allegations are merely a claim; they are not in any sense evidence or proof, and are not to be taken by you in any sense as evidence or proof of what damages should be awarded if you award any damages. If

you award damages, the amount of damages you must resolve for yourselves under the instructions which I have given you, and which I will now give you, and upon the evidence which has been introduced.

If you find that the plaintiff is entitled to a verdict against either of the defendants or both of them, you should award as against such defendant or defendants such amount of damages that will reasonably compensate the plaintiff for all the detriment suffered by him, of which defendant's or defendants' negligence, if you find there was any such negligence, was the proximate cause; whether such detriment could have been anticipated or not.

In any instructions which I give you with respect to damages, I am not implying that you should give damages. I am giving you these instructions respecting damages only in the event that you should first determine that either defendant or both are liable. In estimating the amount of damages, you may consider the nature and the extent and the severity of his injury or injuries, if any, the extent and degree and character of the suffering, mental or physical, if any, its duration and its severity, if any, and you may consider the loss of time and the value thereof, and the loss of earning capacity of the plaintiff, if any. You may also consider whether the injury was temporary in its nature or permanent in its character. And from all those elements you can resolve what sum will fairly compensate the plaintiff for the injuries sustained, if you find

he sustained any injuries as a proximate result of the negligence on the part of such defendant or defendants. You may also consider as an element of damage the following: the reasonable value, not exceeding the cost to said plaintiff of the examinations, attention and care by physicians and surgeons, if any, reasonably certain to be required and to be given, and further treatments, if any, including in such care X-ray pictures reasonably necessary; the reasonable value not to exceed the cost to said plaintiff of the services of nurses, attendants, hospital accommodations and care, reasonably certain to be required and to be given in future treatments, if any. And in that connection I might say that as far as the past is concerned, there is no evidence of any cost to him for medical, hospital, nurses and X-rays. So what I have just told you deals with the future, not with the past. The reasonable value of the time lost by said plaintiff since his injury wherein he has been unable to pursue his occupation is another element you can consider.

In determining this amount, you should consider evidence of the plaintiff's earning capacity, his earnings and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled. The foregoing elements of damage specifically thus far mentioned in these instructions are elements which, if existent, can be proved by evidence. It follows, therefore, that your decision on such matters may not be arbi-

trary, but must be founded on the evidence before you.

You are instructed that with regard to pain and suffering, the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and under all the circumstances may be reasonable and proper. It is not necessary, therefore, that any witness or witnesses should have expressed an opinion as to the amount of such damages for pain and suffering. The jury may make such estimate of the damages from the facts and circumstances in evidence by considering them in connection with their own knowledge and experience in the affairs of life.

If the plaintiff claims he will suffer in the future as a result of this accident, and if you return a verdict in favor of the plaintiff, then you cannot include any amount on account of such claimed future suffering unless the plaintiff has produced proof by a preponderance of the evidence that there is a reasonable certainty that he will suffer in the future. If you should find in favor of the plaintiff, then I instruct you that in fixing the damages, you may make allowance only for such elements that have been proved with reasonable certainty. Any claimed element of damage, past, present or future, as to which such uncertainty exists, must be eliminated from your considerations and must be eliminated as an element to be compensated for.

If you make an award in favor of the plaintiff, the only elements or matters for which you can make any allowance by way of compensation are those which are proximately caused by the accident. If damages are awarded, the only amount that you can award is such as reasonably to compensate for the detriment suffered. If damages are awarded, they must not in any event exceed what is reasonable. They must not be enlarged so as to constitute either a gift or windfall to the plaintiff, or punishment or penalty to the defendants or either of them. The only purpose of damages is to award reasonable compensation. There is no purpose here to inflict punishment or impose any penalty or make an award for the sake of example. If you should return a verdict in favor of the plaintiff, then in making the amount of recovery, you must bear in mind that a defendant is just as much entitled to your consideration as is the plaintiff. The defendant is entitled to protection at your hands against any unjust or unreasonable demand, and if you make any award in favor of the plaintiff, it will be your duty to see to it that such an award does not exceed what the plaintiff is in fact and in law entitled to recover.

I further instruct you that the burden of proof as to the amount of plaintiff's damages is upon the plaintiff, just as the burden of proof of every other affirmative allegation of plaintiff's complaint.

If, in making an award in favor of the plaintiff, you find that in the future there will be a loss of earning capacity, and make an allowance on that

account, then in giving consideration to that element, in making an award, you should consider the loss, if any, which the plaintiff has suffered by reason of loss of earning capacity. In this regard you should consider not the future earnings which the employer of the plaintiff would have paid, but only the loss to plaintiff, and which is based not upon the gross earnings the employer would pay but on the net amount which the plaintiff would have received, which means that deductions on account of income tax which the plaintiff would have been required to pay on earnings must be taken into consideration, so far as this element may enter into an award; and this for the reason that any reward which you make in this action on account of future detriment because of physical injury to the plaintiff himself is not subject to federal income tax.

It is the duty of you ladies and gentlemen of the jury to give uniform consideration to all the instructions I have given you and to consider the whole and every part thereof, together, and to accept such instructions as a correct statement of the law involved in this case. Ladies and gentlemen, if you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. Upon the other hand, it is entirely proper for you to adhere to your own view if, after a full exchange of ideas, you still believe you are right.

If you find in favor of the plaintiff in this case, you should not, in arriving at the amount of your verdict, resort to the so-called "pooling plan" or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then add up the total and divide by twelve, and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon chance.

I finally caution you that if it becomes necessary for the jury to communicate with the court during its deliberations, or upon its return to the court respecting any matter connected with the trial of this case, you should not indicate to the court in any manner how the jury stands numerically or otherwise on the issues submitted. This caution the jury should observe at all times after the case is submitted to it and until the jury has reached a verdict. Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, your verdict must be unanimous respecting each of the defendants. In other words, you must treat this case as if it were two separate actions, insofar as your verdict is concerned.

When you retire to the jury room to deliberate, you will select one of your number as your foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this cause.

Now I have here five forms of verdict, and in presenting these forms to you and telling you what they are, I am not suggesting in any manner what your verdict or verdicts should be. The first form of verdict, after eliminating the title of court and cause, reads as follows: "We the jury find in favor of the plaintiff and assess the damages against the defendants in the sum of blank dollars." That is to be used in the event that you bring in a verdict against both defendants.

The second form is: "We the jury find in favor of the plaintiff and against the defendant Southern Pacific and assess the damages against the defendant in the sum of blank dollars." That is to be used in the event that you find in favor of the plaintiff against the Southern Pacific and not against the Cement Company.

The third form is: "We the jury find in favor of the plaintiff and against the defendant Pacific Portland Cement Company and assess the damages against the defendant in the sum of blank dollars."

The fourth form is: "We the jury find in favor of the Southern Pacific Company." I might say in regard to that third form, that that is to be used in the event you find a verdict against the Pacific Portland Cement Company and in favor of the Southern Pacific Company.

Then I also have the form of verdict: "We the jury find in favor of the Southern Pacific Company." And in the event that you should find in the favor of the Southern Pacific Company, you

would sign that verdict. In the event you should find against the Cement Company, you would sign the previous verdict read to you, and vice versa as far as both the defendants are concerned.

The last verdict, the form of the verdict, is: "We the jury find in favor of the defendant Pacific Portland Cement Company."

Now are there any exceptions?

(During the deliberations of the jury, the following message was sent to the court by the foreman of the jury:)

"In the case of Bellamy vs. the Pacific Portland Cement Company, if negligence is shown by both the plaintiff and the driver, regardless of the amount, can a decision be reached in favor of the plaintiff?"

"Also, we would like to see the transcripts or statements of the accident by the crew members and driver Carlson."

(In reply thereto, the following answer was sent to the foreman of the jury by the court:)

"Your inquiry is as follows:

'In the case of Bellamy vs Pacific Portland Cement Company, if negligence is shown by both plaintiff and the driver, regardless of the amount, can a decision be reached in favor of the plaintiff?'

"The answer to this inquiry is: Insofar as the defendant Cement Company is concerned, if there was any negligence on the part of the plaintiff,

regardless of the degree thereof, which contributed to the accident, there can be no decision in favor of the plaintiff and against the Cement Company.

“You have asked for certain statements which are handed you herewith. As certain parts of said statements were ruled out of evidence, those parts have been deleted from these statements. The statements handed you are the statements of Quinlan made on the 27th of April, 1949, the statement of Edwards made on April 5, 1949, and the statement of Quinlan made on September 11, 1949.

“The statement of the driver Carlson was not put or read into evidence. The only part of this statement in evidence read as follows:

‘I believe I noticed a man hanging on to the step of the boxcar. The next thing I realized was that I felt a bump. I immediately put on the brakes and stopped.’

“The statements of the remaining members of the railroad crew other than Edwards and Quinlan were not read in evidence or admitted in evidence and therefore are not available to you.”

CERTIFICATE OF REPORTER

I, Eldon N. Rich, Official Reporter, certify that the foregoing 43 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

ELDON N. RICH.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28,909-E

Before: Hon. Herbert W. Erskine,
Judge.

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion; and PACIFIC PORTLAND CEMENT
COMPANY, a Corporation,

Defendants.

EXCEPTIONS TO INSTRUCTIONS
REPORTER'S TRANSCRIPT

November 9, 1949

APPEARANCES:

For the Plaintiff

ROBERT HEPPELLE, ESQ.,
EDWARD M. DIGARDI, ESQ.

For the Defendants

Southern Pacific Co.

LOUIS L. PHELPS, ESQ.

Pacific Portland Cement Co.

LEIGHTON BLEDSOE, ESQ.

(A jury was duly impaneled and sworn, the respective parties presented their cases, argued to the jury and the Court instructed the jury upon the law; thereupon the following occurred.)

The Court: Now are there any exceptions? [2]

* * *

Mr. Bledsoe: Defendant Pacific Portland Cement Company respectfully excepts to the giving of the instructions on the workmen in the street rule, which is about the 39th instruction, [15] I think, that was given, on the ground that we take the position that rule does not apply, that there is no evidence to support it, and that the evidence shows that the rule does not apply in this case.

We also respectfully except, since the rule has been given, to the failure of the Court to give, under the separate request for instructions of this defendant, instruction No. 2, on the authority of *Lewis vs. Southern California Edison Company*, and instruction No. 3, under the authority of *Milton vs. L. A. Motor Coach Company*, and instruction No. 4, under the authority of *Milton vs. L. A. Motor Coach Company*, on the ground that those additional instructions contained additional elements that were not contained in the general charge of the Court on the issue of the workmen in the street rule, and that those additional instructions would give the jury the opportunity of deciding whether the rule applied or not.

We also respectfully except to plaintiff's No. 7, on the ground that it does not take into account the possibility of contributory negligence, and simply says that if the two defendants are concurrently negligent, each of them is liable.

We except to plaintiff's instruction No. 24, which was given about the 14th instruction, I think, on the ground that it says that plaintiff does not have to prove his case beyond a reasonable doubt, which leaves the inference that if he proves it up to a reasonable doubt, is all he is required to prove. [16]

We except to the giving of plaintiff's instruction No. 18, on the ground that it imposes an absolute duty on the part of a motorist to keep his vehicle under control at all times, so as to avoid a collision with other persons; and on the further ground that it assumes something not in evidence. There is no evidence to support the fact that the driver of the automobile was not vigilant and did not anticipate the presence of others, and there is no evidence to support an assumption that the driver of the car did not see the plaintiff. Also on the further ground that the second to the last sentence on line 14 states the assumption that the plaintiff was lawfully using the highway.

We except to plaintiff's instruction 19, given by the Court, on the ground that it states that the defendant driver of the Cement Company had a duty to maintain a constant and vigilant lookout ahead for persons upon the highway, and there is no evidence to support the theory that he did not. The

evidence is to the contrary, that he did. And we register the further exception to it on the ground that lines 13 and 14 contain a statement to the effect, or an assumption to the effect, that the plaintiff was on the highway in the performance of his duties, and that he was required to be there in the performance of his duties. That is a statement of a fact which should be left to the determination of the jury. It also assumes that Mr. Carlson did not see the plaintiff, in the [17] last paragraph of that instruction, assumes such a fact, when there is no evidence to support it and there is evidence to the contrary.

That is all we have, your Honor.

Mr. Phelps: May the record show, your Honor, that as to defendant Southern Pacific Company, we may enlarge upon our exceptions. Plaintiff's instruction No. 7. And we also object to plaintiff's instructions No. 24 and, as well, No. 19, on the grounds as stated by Mr. Bledsoe, and rely upon those grounds additionally.

The Court: All right.

Mr. Bledsoe: So far as they are applicable to the Southern Pacific Company.

The Court: Well, I will adhere to the instructions as given.

Will you call the jury back now?

(Jury returned to the court room and resumed their positions in the jury box.)

The Court: Ladies and gentlemen, the marshal has the forms of verdict, and you are now directed to retire again to the jury room, and this time start your deliberations.

So, Mr. Linehan, would you take the jury to the jury room?

(Thereupon the jury retired to enter upon their deliberations.) [18]

CERTIFICATE OF REPORTER

I, Eldon N. Rich, Official Reporter, certify that the foregoing 18 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ ELDON N. RICH.

[Endorsed]: Filed January 26, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true and correct copy of an order entered on the minutes

of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the appellant, to wit:

Complaint for Damages

Answer of Defendant Pacific Portland Cement Company to Complaint

Answer of Southern Pacific Company

Verdict

Note to Jury

Plaintiff's Proposed Instructions

Instructions Requested by Defendants Pacific Portland Cement Company, Additional Instructions Requested by Defendant Pacific Portland Cement Company and Separate Request for Instructions by Pacific Portland Cement Company

Judgment on Verdicts

Notice of Motion for Judgment and of Motion for New Trial

Minute Order of November 30, 1949—Order Denying Defendant's Motions for Judgment Notwithstanding the Verdict, or For a New Trial

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit

Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal

Order Extending Time

Reporter's Transcripts:

Vol. 1—November 1, 1949—Testimony of William A. Bellamy

Vol. 2—November 2, 1949—Testimony of William A. Bellamy

Vol. 3.—November 2, 1949—Testimony of Frank G. Edwards

Vol. 4—November 9, 1950—Instructions to the Jury

Vol. 4—November 1, 2 & 7, 1949—Partial Reporter's Transcript

November 9, 1949—Exceptions to Instructions

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 27-A, 27-B, 27-C, 27-D, 27-E, 27-F, 27-G, 27-H, 28, 28-A, 28-B, 28-C, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 43.

Defendants' Exhibits Nos. A, B, C, D, F, G, H, AA, BB, CC and DD.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of February, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12482. United States Court of Appeals for the Ninth Circuit. Pacific Portland Cement Company, a corporation, Appellant, vs. William A. Bellamy, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 20, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12482

PACIFIC PORTLAND CEMENT COMPANY,
a corporation,

Appellant,

vs.

WILLIAM A. BELLAMY, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant intends to rely on the following points:

1. The evidence was insufficient as a matter of law to establish negligence on the part of appellant or its servants.

2. Assuming (without conceding) that Appellant was negligent, Appellee was guilty of contributory negligence as a matter of law.

3. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 7.

4. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 24.

5. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 18.

6. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 19.

7. The trial Court committed prejudicial error when it gave, over Appellant's objection, instructions to the effect that Appellee (plaintiff) was entitled to the benefit of the "workman in the street" rule.

8. The trial Court committed prejudicial error when, having, over Appellant's objection, instructed on the "workman in the street" rule, it refused, over Appellant's objection, to give Appellant's (defendant Pacific Portland Cement Company's) Separate Request for Instructions, and, particularly, No. 2, No. 3, and No. 4 of such Separate Request for Instructions.

9. The trial Court committed prejudicial error when, over Appellant's objection, it admitted in evidence Appellee's (plaintiff's) Exhibit No. 41, and permitted such exhibit to be read to the jury, in view of the fact that such evidence was incompetent, irrelevant, and immaterial.

/s/ LEIGHTON M. BLEDSOE,

(C)

DANA, BLEDSOE & SMITH,

Attorneys for Appellant.

Receipt of copy attached.

[Endorsed]: Filed February 24, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
DEEMED BY APPELLANT TO BE NEC-
CESSARY FOR CONSIDERATION OF THE
APPEAL

Appellant designates, pursuant to Rule 19 of this Court, the following parts of the record deemed necessary for consideration of the appeal:

1. Complaint.
2. Answer of Appellant (defendant) Pacific Portland Cement Company to Complaint.
3. Answer of defendant Southern Pacific Company to Complaint.

4. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received and read in evidence, all motions and applications made during the trial and the rulings thereon, subject to the exceptions noted under paragraph 10, *infra*.

5. The verdict of the Jury and Judgment entered thereon.

6. Motion of Appellant (defendant Pacific Portland Cement Company) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

7. Minute order denying said motion.

8. Instructions given by the Court.

9. The following instructions proposed by Appellant (defendant Pacific Portland Cement Company) and, over Appellant's objections, refused by the Trial Court:

Appellant's (defendant Pacific Portland Cement Company's) "Separate Request for Instructions" consisting of title page and numbered pages 1, 2, and 3.

10. The following instructions given at request of Appellee (plaintiff) and objected to by Appellant:

Appellee's (plaintiff's) requested instruction number 7;

Appellee's (plaintiff's) requested instruction number 24;

Appellee's (plaintiff's) requested instruction number 18;

Appellee's (plaintiff's) requested instruction number 19.

(It is suggested that in printing the transcript on appeal, it will be unnecessary to print separately Appellee's said requested instructions, and that it will be sufficient if the printer designate in that portion of the record embodying the trial Court's instructions that the instructions referred to, respectively, were given at the request of Appellee; to this end, Appellant here designates the portions of the Reporter's Transcript entitled "Instructions to the Jury" which embody Appellee's requested instructions numbered 7, 24, 18 and 19:

Appellee's requested instruction No. 7, "Instructions to the Jury" page 7, lines 17 to 22, inclusive;

Appellee's requested instruction No. 24, "Instructions to the Jury" page 8, lines 13 to 20 inclusive;

Appellee's requested instruction No. 18, "Instructions to the Jury," page 10, lines 12 to 24, inclusive;

Appellee's requested instruction No. 19, "Instructions to the Jury," page 10, line 25, to page 11, line 20, inclusive.)

11. Reporter's Transcript, except as indicated herein:

(a) Volume 1, except as follows:

Page 31, line 10, to and including page 41, line 2;

Page 51, line 17, to and including page 53, line 8.

(b) Volume 2, except as follows:

Page 74c, line 18, to and including page 78, line 12;

Page 105, line 20, to and including page 107, line 16.

(c) Volume 3 (print in its entirety).

(d) Volume 4, except as follows:

Page 75, line 3, to and including page 102A, line 2;

Page 196, line 23, to and including page 199, line 14;

Page 348, line 1, to and including page 352, line 12;

Page 353, line 16, to and including page 365, line 23.

(e) Instructions to the Jury (print in its entirety).

(f) Exceptions to Instructions, except as follows:

Page 2, line 2, to and including page 15, line 22.

12. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

13. Designation of the Portions of the Record,

Proceedings and Evidence to be Contained in the Record on Appeal.

14. Designation of Parts of Record Deemed by the Appellant to be Necessary for Consideration of the Appeal.

15. All other records required by the provisions of Rule 75(g), Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,
(C)
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

Receipt of copy attached.

[Endorsed]: Filed February 24, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF SEQUENCE IN WHICH
VOLUME AND PAGES OF REPORTER'S
TRANSCRIPT SHOULD BE PRINTED

Noting that the volumes and pages, respectively, of the Reporter's Transcript are not in correct chronological sequence, Appellant herewith designates the order in which the respective volumes and pages of the Reporter's Transcript should be printed to the end that the printed record will show such sequence with reference to the parts of the record deemed necessary for consideration of the appeal and heretofore so designated:

Volume 1: 1:1 to 31:9 (indicating page 1, line 1, to page 31, line 9, inclusive), 41:3 to 51:16, 53:9 to 74:13.

Volume 2: 74-A:1 to 74-C:17, 78:13 to 105:19, 107:16 to 122:16.

Volume 4: 75:1 to 75:4, 157:1 to 170:15.

Volume 3: 123:1 to 136-A:6.

Volume 4: 185:1 to 196:22, 199:15 to 347:16, 352:13 to 353:16, 365:21 to 365:23.

Instructions to the Jury: Print in its entirety.

Exceptions to Instructions: Print the following portion: 2:1 to 2:1 (one line), 15:23 to 18:24.

/s/ LEIGHTON M. BLEDSOE,
(C)

DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

[Endorsed]: Filed March 1, 1950.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD DEEMED NECESSARY FOR CONSIDERATION OF THE APPEAL

Appellee designates, pursuant to Rule 19 of this Court, the following additional parts of the record deemed necessary for consideration of the appeal:

Reporter's Transcript Volume I, p. 31, line 10, to p. 38, line 9, inclusive; and Volume IV, p. 75, line 3, to p. 99, line 25, inclusive.

Dated: San Francisco, March 6, 1950.

/s/ HERBERT O. HEPPELLE,
Attorney for Appellee
William A. Bellamy.

Receipt of copy acknowledged.

[Endorsed]: Filed March 6, 1950.